Supreme Court, U.S.
05-408 SEP 21 2005
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No. ____

IN THE

Supreme Court of the United States

CARL KIRCHER, ET AL.,
Petitioners,

v.

PUTNAM FUNDS TRUST, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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September 29, 2005

QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction, contrary to the holdings of three other circuits, to review a district court order remanding for lack of subject-matter jurisdiction a suit removed under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), notwithstanding 28 U.S.C. § 1447(d)'s bar on appellate review of remand orders based on lack of subject-matter jurisdiction and the district courts' conclusion that petitioners' claims are not preempted by and thus not removable under SLUSA.

2. Whether the court of appeals erred in holding, in acknowledged conflict with three other circuits, that SLUSA preempts claims brought by holders of securities, notwithstanding SLUSA's language limiting preemption to claims "in connection with the purchase or sale of a covered security," and this Court's interpretation of identical language to cover only claims brought by purchasers or sellers in *Blue Chip Stamps, Inc. v. Manor Drug Stores*, 421 U.S. 723 (1975).

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners Carl Kircher, Beth Dudley, Steve Dudley, Avery Jackson, Dorothy Leuttinger, T.K. Parthasarathy, Robert Potter, Terry Spurgeon, as Custodian for the Benefit of James E. Spurgeon, and Gary Vogeler were plaintiffs in the district court and appellees in the court of appeals.*

Robert Brockway, Sharon Smith, Stuart A. Smith, and Edmund Woodbury also were plaintiffs in the district court but did not participate in the court of appeals proceedings, and thus are not parties to the petition for a writ of certiorari.

The following were defendants in the district court and appellants in the court of appeals, and are respondents here:

Artisan Funds, Inc.

Artisan Partners Limited Partnership

Columbia Acorn Trust

Columbia Wanger Asset Management L.P.

Deutsche Investment Management Americas Inc.

Janus Capital Management LLC

Janus Investment Fund

Pacific Life Insurance Company

Putnam Funds Trust

Putnam International Equity Fund

Putnam Investment Funds

Putnam Investment Management, LLC

Scudder International Fund, Inc.

Van Kampen Investment Advisory Corporation

Van Kampen Series Fund, Inc.

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* Petitioners each filed suit as individuals and on behalf of all others similarly situated.

AIM Advisors, Inc., AIM International Funds, Inc., Evergreen International Trust, Evergreen Investment Management Company LLC, T. Rowe Price International Funds, Inc., T. Rowe Price International, Inc., Templeton Funds, Inc., Templeton Global Advisors Limited, Templeton Global Smaller Companies Fund, Inc., Templeton Growth Fund, Inc., and Templeton Investment Counsel LLC also were defendants in the district court but did not participate in the court of appeals proceedings, and thus are not parties to the petition for a writ of certiorari.

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Carl Kircher, Beth Dudley, Steve Dudley, Avery Jackson, Dorothy Leuttinger, T.K. Parthasarathy, Robert Potter, Terry Spurgeon, as Custodian for the Benefit of James E. Spurgeon, and Gary Vogeler (collectively, "petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

INTRODUCTION

These eight consolidated cases involve two frequently litigated issues of securities law of vital importance to the administration of the federal courts and the investing community. The circuits are deeply divided on the jurisdictional and substantive questions presented. In the two opinions below, the Seventh Circuit created conflicts with four other circuits, leaving petitioners and investors like them without a remedy for a practice by arbitrageurs that costs investors an estimated $5 billion every year.[1]

Petitioners are long-term investors in international mutual funds. They sued respondent funds and their managers in state court, alleging that the funds negligently or recklessly failed to calculate share prices accurately and thereby exposed petitioners to an investment-diluting practice known as "stale price trading" or "market timing." That practice involves arbitrageurs trading on time differences between the closing of U.S. markets and foreign exchanges. It dilutes the value of investors' long-term holdings as well as their voting rights. Because market timing injures non-trading shareholders of mutual funds – not purchasers or sellers – petitioners sought to represent classes of individuals who held shares in funds that experienced market-timing activity.

The respondent mutual funds removed the lawsuits to federal district court and moved for dismissal under the

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[1] *See* United States Government Accountability Office, *Mutual Fund Trading Abuses: Lessons Can Be Learned from SEC Not Having Detected Violations at an Earlier Stage* 4-5 (Apr. 2005) ("GAO Report"), *available at* http://www.gao.gov/new.items/d05313.pdf.

Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). Petitioners moved for remand based on lack of subject-matter jurisdiction. All of the district court judges in these eight consolidated cases concluded that SLUSA did not preempt petitioners' claims, because the claims were in connection with the retention or holding of securities, rather than "in connection with the purchase or sale of a covered security." 15 U.S.C. § 77p(b). The district judges further found that, because petitioners' claims were not preempted, they were also not removable under SLUSA and therefore had to be remanded to state court for lack of subject-matter jurisdiction.

On respondents' appeal of those remand orders, the Seventh Circuit issued two decisions that independently warrant certiorari. First, the court held that 28 U.S.C. § 1447(d), which precludes appellate review of remands based on a district court's conclusion that it lacked subject-matter jurisdiction, did not bar review of the orders in these cases. The Seventh Circuit rejected the district courts' characterization of their own orders as grounded on a lack of jurisdiction. *See* Pet. App. 10a-17a ("*Kircher I*"). In doing so, the Seventh Circuit acknowledged that it was creating a conflict with the Second and Ninth Circuits, which have held that § 1447(d) bars review of a district court's remand order under SLUSA. *See Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116 (2d Cir. 2003); *United Investors Life Ins. Co. v. Waddell & Reed Inc.*, 360 F.3d 960 (9th Cir. 2004); *Abada v. Charles Schwab & Co.*, 300 F.3d 1112 (9th Cir. 2002). Since the Seventh Circuit's decision on this remand issue, the Eleventh Circuit has rejected the approach adopted by the Seventh Circuit and has agreed with the Second and Ninth Circuits. *See Williams v. AFC Enters., Inc.*, 389 F.3d 1185 (11th Cir. 2004).

After concluding that it had appellate jurisdiction, the court then issued an opinion on the merits, where it again created a split, this time with the Second, Eighth, and Eleventh Circuits. Those circuits hold that SLUSA's pre-

emption provision – which preempts class-action securities fraud claims "in connection with the purchase or sale of a covered security" – does not apply to claims brought by *holders* of securities, as opposed to purchasers or sellers. *See Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25, 43 (2d Cir. 2005), *cert. granted*, No. 04-1371 (U.S. Sept. 27, 2005); *Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.3d 1334 (11th Cir. 2002); *Green v. Ameritrade, Inc.*, 279 F.3d 590 (8th Cir. 2002). In those courts, the "in connection with" language of SLUSA has the same meaning as the nearly identical language in § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and its corresponding Rule 10b-5, 17 C.F.R. § 240.10b-5, which this Court has interpreted to cover only claims brought by purchasers or sellers. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). The Seventh Circuit, by contrast, concluded below that a class-action plaintiff need not be a purchaser or seller of securities for SLUSA to preempt his or her claims. *See* Pet. App. 1a-9a ("*Kircher II*"). Two days ago, this Court granted certiorari to resolve this issue in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, No. 04-1371.

The Seventh Circuit's decision below not only created a conflict with three other circuits and countless district courts, but also completely extinguished an entire category of claims that have existed for more than 50 years and with this Court's blessing for the last 30. *See Blue Chip Stamps*, 421 U.S. at 739 n.9 (noting availability of "remedies . . . to nonpurchasers and nonsellers under state law"). Shareholders like petitioners who have no § 10(b) or Rule 10b-5 claim because they do not allege misconduct "in connection with" the purchase or sale of a security under those provisions are now simultaneously denied a cause of action under state law because their claims are deemed preempted under SLUSA as "in connection with" the purchase or sale of a security. The Seventh Circuit's holdings thus snuff out the claims of tens of millions of mutual fund investors who have collectively

suffered an annual multi-billion-dollar dilution in the value of their holdings from the funds' negligent and reckless practices. The Seventh Circuit's decision strips such investors of any direct private cause of action, on the theory that their "claims must be left to public enforcement." Pet. App. 8a.

OPINIONS BELOW

The district courts' opinions granting plaintiffs' motions to remand (Pet. App. 23a-64a) are unreported. The court of appeals' opinions finding appellate jurisdiction (*id.* at 10a-17a), and reversing and remanding the district courts' judgments with instructions to undo the remand orders and to dismiss plaintiffs' state-law claims (*id.* at 1a-9a), are reported at 373 F.3d 847 and 403 F.3d 478.

JURISDICTION

The court of appeals entered its judgment on April 5, 2005. A timely petition for rehearing was denied on May 2, 2005. Pet. App. 65a. On July 22, 2005, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including August 30, 2005, *id.* at 143a, and, on August 26, 2005, further extended the time for filing to and including September 29, 2005, *id.* at 144a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are set forth at Pet. App. 118a-142a.

STATEMENT OF THE CASE

A. The Statutory Framework

In 1995, Congress passed the Private Securities Litigation Reform Act ("PSLRA") (codified in part at 15 U.S.C. §§ 77z-1, 78u) to prevent "strike suits," or meritless class actions alleging fraud in the securities market. *See* H.R. Conf. Rep. No. 105-803, at 13 (1998). To deter those suits, the PSLRA imposes stringent pleading and other procedural requirements on securities class-action plaintiffs. To avoid the PSLRA's requirements, plaintiffs increas-

ingly brought suit against issuers in state court alleging securities fraud under state statutory or common law.

To prevent private plaintiffs from such alleged circumventions of the PSLRA, Congress passed SLUSA, which added to the Securities Act of 1933 ("1933 Act") and the Securities Exchange Act of 1934 ("1934 Act") identical provisions that preempt certain class actions under state law. Specifically, SLUSA's preemption provision states:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –
>
> (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

15 U.S.C. § 77p(b); *accord id.* § 78bb(f)(1). SLUSA authorizes such actions to be removed to federal court:

> Any covered class action brought in any State court involving a covered security, as set forth in subsection (b) of this section, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).

Id. § 77p(c); *accord id.* § 78bb(f)(2). Following removal, if the district court determines that the action is not in fact within the scope of SLUSA's preemption provision, it must remand the action to state court. *See id.* §§ 77p(d)(4), 78bb(f)(3)(D).

B. Petitioners' Common-Law Claims

Petitioners are among the more than 90 million individual long-term investors whom the Federal Reserve estimates have more than $4 trillion in long-term savings invested in mutual funds with substantial holdings in

international stocks. *See* Financial Policy Forum, Special Policy Brief 13 – *Overview of Mutual Fund Scandal: "A Gauntlet of Fraud"* (Dec. 14, 2003; updated May 21, 2004), *available at* http://www.financialpolicy.org/fpfspb13.htm. The price at which one share of a mutual fund is sold and redeemed is equal to the value of the fund's portfolio of securities, known as the fund's net asset value ("NAV"), divided by the number of outstanding shares. The NAV is calculated once a day at 4:00 p.m. Eastern Time. When a fund holds assets that trade in competitive markets, it must value those assets at their market price. *See* 15 U.S.C. § 80a-2(a)(41)(B)(ii); 17 C.F.R. § 270.2a-4(a).

Respondents value their assets using the final closing price of the foreign security in its home market. For domestic securities, that method yields a current price. For securities of foreign issuers, however, the method produces prices that are up to 15 hours old and may no longer reflect the current value of the foreign security, causing mutual fund share prices to be either artificially high or artificially low. For example, if the United States market moves up following the close of Asian and European markets, investors can predict that foreign markets will move up once trading begins on their next trading day, and a share price based on foreign securities' final closing price will be artificially low. Or, as the Seventh Circuit explained below, "[s]tock of a Japanese firm that closes in Tokyo at ¥10,000 might trade in Frankfurt at € 75.22 (equivalent to ¥10,500) between the close in Tokyo and the close in New York – but the mutual fund nonetheless would value each share at ¥10,000, because that was its most recent price in the issuer's home market." *Kircher II*, Pet. App. 2a.

In early September 2003, New York Attorney General Eliot Spitzer announced that his office's investigation of the mutual fund industry "revealed that some of the nation's largest mutual fund companies permitted" a practice called "market timing." *Mutual Funds – Trading Practices and Abuses that Harm Investors: Hearing*

Before the Subcomm. on Federal Financial Management, Government Information, and International Security of the Senate Comm. on Homeland Security and Governmental Affairs, 108th Cong. (Nov. 3, 2003) (Statement of New York Attorney General Eliot Spitzer, *available at* http://hsgac.senate.gov/_files/ACF1DE.pdf). Market timers exploit the time differences between U.S. and foreign markets for short-swing profits. They do so by regularly purchasing and redeeming mutual fund shares on days when the foreign securities in the fund's portfolio are undervalued or overvalued, respectively. Studies have estimated that such trading costs non-trading shareholders like petitioners nearly $5 billion each year by diluting the value of their investments. *See* GAO Report at 4-5.

Every purchase of a mutual fund share at an artificially low price reduces the value of the investments of all existing, non-trading shareholders because the purchaser acquires a larger share of the fund than if the fund had calculated the NAV more accurately. Similarly, every redemption of a share at an artificially high price reduces the value of the investments of non-trading shareholders because the redemption depletes their pooled assets more than if the fund had not relied on stale prices. The mutual fund industry's main trade organization has conceded that "the discovery of trading abuses involving mutual funds . . . put at risk the reputation of the entire fund industry," "shook the industry to its core," and "triggered a degree of Congressional oversight of mutual funds rarely seen in the industry's history."[2]

Petitioners filed eight lawsuits in state court, charging that respondents used pricing methods negligently[3] or

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[2] Investment Company Institute, Trading Abuse Reforms & Actions, *available at* http://www.ici.org/issues/timing.

[3] *See* Pet. App. 69a (¶ 55) (Kircher), 74a, 76a (¶¶ 55, 68) (Potter), 81a (¶ 59) (Parthasarathy), 86a (¶ 53) (Dudley), 91a-92a (¶ 53) (Vogeler), 96a-97a (¶ 52) (Jackson), 109a-110a (¶ 53) (Spurgeon).

recklessly[4] in a way that exposed petitioners' investments to dilution from market timing. The complaints alleged that, because respondents should have known of the existence of market timing and of alternative pricing procedures that would prevent it, respondents breached their duties of care to petitioners and similarly situated owners or shareholders[5] of respondent funds.[6] For example, petitioners alleged that respondents failed to make pricing adjustments based on correlations between movements in the U.S. and foreign markets.[7]

Petitioners filed their claims as class actions on behalf of holders of the relevant securities: specifically, "all persons in the United States who have held shares of [the fund] for more than fourteen days from the date of purchase to the date of sale (redemption) or exchange."[8] The *Spurgeon* complaint took the additional step of explicitly excluding any claims based on purchase or sale. *See* Pet. App. 106a (¶ 39) (Spurgeon) (defining plaintiff class as "all persons in the United States who, through their ownership of [the fund's] products, held units of any [fund] sub-

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[4] *See* Pet. App. 70a (¶ 60) (Kircher), 75a, 76a-77a (¶¶ 60, 73) (Potter), 82a (¶ 64) (Parthasarathy), 86a-87a (¶ 54) (Dudley), 92a (¶ 54) (Vogeler), 97a (¶ 53) (Jackson), 111a (¶¶ 56-57) (Spurgeon).

[5] *See* Pet. App. 69a (¶ 56) (Kircher), 74a-77a (¶¶ 56, 60, 69, 73) (Potter), 81a-82a (¶¶ 60, 64) (Parthasarathy), 85a-86a (¶ 49) (Dudley), 91a (¶ 49) (Vogeler), 96a (¶ 49) (Jackson), 113a-114a (¶ 62) (Spurgeon) (breach of fiduciary duties).

[6] Petitioner Spurgeon also alleged violations of several provisions of the California Business & Profession Code (Count IV). *See* Pet. App. 115a-116a (¶¶ 67, 69, 73).

[7] *See* Pet. App. 66a-68a (¶¶ 17, 32-33) (Kircher), 71a-73a (¶¶ 17, 32-33) (Potter), 78a-80a (¶¶ 22, 37-38) (Parthasarathy), 83a-85a (¶¶ 13, 28-29) (Dudley), 88a-90a (¶¶ 13, 28-29) (Vogeler), 93a-95a (¶¶ 13, 28-29) (Jackson), 103a-104a (¶¶ 31-32) (Spurgeon).

[8] *See* Pet. App. 68a (¶ 41) (Kircher), 73a (¶ 41) (Potter), 80a (¶ 46) (Parthasarathy), 85a (¶ 37) (Dudley), 90a (¶ 37) (Vogeler), 95a (¶ 37) (Jackson) (omitting "from the date of purchase to the date of sale (redemption) or exchange").

account invested in mutual funds which included foreign securities in their portfolios and which experienced market timing trading activity"); *id.* (¶ 40) (excluding "from this Complaint . . . any claims based upon [the fund's] conduct in connection with Plaintiff's or any class member's purchase or sale of any [fund]" product or units). That exclusion is implicit in the other complaints, which assert negligence and recklessness claims that only non-trading shareholders possess. Only holders are injured by market-timing activity: while respondents' use of stale prices may cause a purchaser to buy a fund share at an artificially high price or a seller to redeem a fund share at an artificially low price, those losses do not depend on whether other individuals simultaneously engage in market timing.

C. Proceedings Below

In each case, the respondent fund removed to federal district court, arguing, *inter alia*, that the case fell within the district court's removal jurisdiction under SLUSA, *see* 15 U.S.C. § 77p(c), and that petitioners' claims were preempted by that Act, *see id.* § 77p(b). Petitioners moved to remand the cases to state court for lack of subject-matter jurisdiction. All three district judges to hear those motions agreed with petitioners that they lacked jurisdiction.

Specifically, the district judges found that petitioners' common-law claims were outside the scope of SLUSA's preemption provision because the claims were brought – indeed, could only be brought – by holders of securities, not purchasers or sellers. *See, e.g.*, Pet. App. 26a-27a (Kircher), 30a (Dudley) ("Only *holders* of fund shares have the dilution of ownership interests and voting rights claims asserted in the complaints."), 40a (Parthasarathy) (agreeing that the "'complaint alleges dilution claims that only a holder of securities can bring'") (quoting *Bradfisch v. Templeton Funds, Inc.*, Case No. 03-CV-0760-MJR, slip op. at 6 (S.D. Ill. Jan. 23, 2004)), 44a-45a (Potter) (same), 50a-51a (Vogeler) (same), 56a-57a (Jackson) (same). The district judges concluded that, because petitioners' claims

were not "in connection with the purchase or sale of a covered security," they were not cognizable under § 10(b) of the 1934 Act; were not preempted by the Act as amended by SLUSA; and were not removable under SLUSA. *See, e.g., id.* at 26a-27a (Kircher), 30a (Dudley), 39a-40a (Parthasarathy), 44a-45a (Potter), 50a-51a (Vogeler), 56a-57a (Jackson), 60a-61a (Spurgeon). The district judges remanded all eight cases to state court, expressly basing each remand order on a lack of subject-matter jurisdiction. *See, e.g., id.* at 27a (Kircher), 30a (Dudley), 40a (Parthasarathy), 46a (Potter), 51a (Vogeler), 57a (Jackson), 64a (Spurgeon).

On respondents' appeal of the *Kircher* remand order, the Seventh Circuit initially ordered respondents to show cause why their appeal should not be dismissed for lack of jurisdiction under § 1447(d), which precludes appellate review of remand orders based on a district court's conclusion that it lacked subject-matter jurisdiction. The Seventh Circuit then, in acknowledged conflict with the Second and Ninth Circuits, issued a published decision holding that it had jurisdiction to review the district court's remand order. *See Kircher I*, Pet. App. 15a-16a (acknowledging conflicts with *Spielman*, *United Investors*, and *Abada*).

The Seventh Circuit noted that, under § 1447(d), a remand on a ground listed in § 1447(c) is unappealable. *See id.* at 12a. Section 1447(c) provides that a case must be remanded if the court lacks subject-matter jurisdiction. The court, however, did not accept the district court's explanation that its remand order was based on a lack of subject-matter jurisdiction. *See id.* at 27a. The court characterized the district court opinion as holding that removal was *proper* – notwithstanding the district court's statements that "removal is appropriate only if the Court has federal question jurisdiction over Plaintiffs' claims" (*id.* at 24a), and that "SLUSA does not permit removal of Plaintiffs' claims" because petitioners' claims were not preempted by SLUSA (*id.* at 26a-27a).

To reach its conclusion that the remand orders were appealable, the Seventh Circuit opined that SLUSA permits removal of all "covered class actions" – that is, all class actions that seek damages on behalf of more than 50 investors, *see* 15 U.S.C. § 77p(f)(2)(A) – even though the Act only preempts "covered class actions" that meet the further requirement of alleging an untrue statement or omission, or use of a manipulative or deceptive device, "in connection with the purchase or sale of a covered security," *id.* § 77p(b). The court did not address petitioners' argument that the words "as set forth in subsection (b)" in § 77p(c) make clear that only those actions preempted by SLUSA are subject to remand. Rather, it held that a district court may find removal proper even though a lawsuit is outside SLUSA's preemptive scope when the lawsuit is a "covered class action." The court found that remand of such a lawsuit is not based on a lack of subject-matter jurisdiction, because "a court lacks 'subject-matter jurisdiction' only when Congress has not authorized the federal judiciary to resolve the sort of issue presented by the case." *Kircher I*, Pet. App. 13a.

The Seventh Circuit concluded that a remand under SLUSA is unlike a "[n]ormal" remand that "leave[s] all substantive issues open to plenary resolution in the state court," because whether SLUSA preempts a class action is "one specific substantive decision . . . [that] must be made by the federal rather than the state judiciary." *Id.* at 15a. The Seventh Circuit reasoned that, under SLUSA, state judges are incapable of making a preemption ruling, and thus "it is now or never for appellate review of the question whether an action under state law is preempted." *Id.*

Having determined that it could exercise appellate jurisdiction over the district court's remand order in the *Kircher* case consistent with § 1447(d), the Seventh Circuit consolidated these eight cases, which present identical issues, for briefing and decision on the merits. The Seventh Circuit began by rejecting petitioners' renewed jurisdictional objections and stating that, under *Kircher I*,

the remand orders in all of the lawsuits were appealable. On the merits, the Seventh Circuit then held that SLUSA completely preempted petitioners' state-law claims.

In so holding, the Seventh Circuit recognized that "[e]very court of appeals to encounter SLUSA has held that its language has the same scope as its antecedent in Rule 10b-5." *Kircher II*, Pet. App. 5a. The court purported to agree with that conclusion, observing that SLUSA was designed to prevent Rule 10b-5 private plaintiffs from migrating to state court to avoid the PSLRA. The court acknowledged that its decision conflicted with prior decisions of the Second, Eighth, and Eleventh Circuits; that, in *Blue Chip Stamps*, the Supreme Court had held that investors who neither purchase nor sell securities have no cause of action under § 10(b) and Rule 10b-5; and that the *Spurgeon* complaint defined a class of non-trading shareholders who could not bring a private action under Rule 10b-5. *Id.* at 5a-7a.[9]

The Seventh Circuit nevertheless concluded that the *Spurgeon* plaintiffs' claims were "in connection with the purchase or sale" of securities and were preempted by SLUSA. The court read *Blue Chip Stamps*' holding that only purchasers or sellers can bring claims under § 10(b) and Rule 10b-5 *not* as an interpretation of the "in connection with the purchase or sale" language in the 1934 Act.

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[9] The Seventh Circuit ruled that the complaints in the other cases did not succeed in defining classes of non-trading shareholders because some of the investors who held shares during the class period undoubtedly purchased or sold shares during that period. Petitioners believe that this ruling is incorrect. Whether the classes include some individuals who happen also to be purchasers or sellers is irrelevant. The complaints assert negligence and recklessness claims on behalf of class members who were injured by market timing, which, as explained above, *see supra* p. 9, is a claim that only holders can assert. Purchasers or sellers could not bring the claims asserted in the complaints, because they are not injured by market timing. In any event, because the Seventh Circuit did find that the *Spurgeon* complaint defined a class of holders without claims under Rule 10b-5, the court's error on this point is not material to the petition.

Rather, the court viewed the *Blue Chip Stamps* rule as a policy-based, judicial limitation on the private right of action to enforce § 10(b) and Rule 10b-5 that is not grounded in the text of § 10(b). *See id.* at 7a (stating that "*Blue Chip Stamps* came out as it did" because "the Court wanted to confine [private] actions to situations where litigation is apt to do more good than harm"). The court concluded that, "[b]y depicting their classes as containing entirely non-traders, plaintiffs do not take their claims outside § 10(b) and Rule 10b-5; instead, they demonstrate only that the claims must be left to public enforcement." *Id.* at 8a.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT CERTIORARI TO REVIEW THE SEVENTH CIRCUIT'S HOLDING THAT REMAND ORDERS UNDER SLUSA ARE SUBJECT TO APPELLATE REVIEW

A. The Seventh Circuit's Exercise Of Appellate Jurisdiction Squarely Conflicts With Decisions Of Three Other Circuits

In holding that 28 U.S.C. § 1447(d) does not bar courts of appeals from reviewing a remand order based on a district court's finding that a plaintiff's claims are not preempted by SLUSA, the Seventh Circuit acknowledged it was creating a conflict with the Second and Ninth Circuits. Those circuits hold that SLUSA's preemption and removal provisions are co-extensive, meaning that a state-law action that falls outside of SLUSA's preemptive scope is not properly removed under SLUSA. In the Second Circuit, Ninth Circuit, and Eleventh Circuit (which agreed with the former two courts after the decision below), a district court's remand of such a lawsuit is based on a lack of subject-matter jurisdiction and is not reviewable under § 1447(d).

The Seventh Circuit, by contrast, insisted that SLUSA authorizes removal of lawsuits that the statute does not preempt; disregarded the district courts' own characteri-

zations of their remand orders as predicated on a lack of jurisdiction; and held that the remands of non-preempted lawsuits were not based on lack of jurisdiction. The division between the circuits is clear and stems from two opposing interpretations of SLUSA's removal provision: one (the Seventh Circuit's) that regards the provision as authorizing removal of all "covered class actions," and another (the Second, Ninth, and Eleventh Circuits') that regards it as authorizing removal only of those actions described in SLUSA's preemption provision.

1. Second Circuit – *Spielman*

In *Spielman*, the Second Circuit addressed whether it could review a district court order granting a motion to remand after determining that the defendant's alleged misrepresentations were not "in connection with the purchase or sale" of securities, and that the plaintiff's claims were therefore not preempted by SLUSA. The Second Circuit stated that "SLUSA's removal provision makes removable any class action preempted by 15 U.S.C. § 78bb(f)(1)(A) [SLUSA's preemption provision]." 332 F.3d at 123. Thus, in the Second Circuit's view, "SLUSA only converts into federal claims those state claims that fall within its clear preemptive scope, thereby confining federal question jurisdiction under this statutory regime to a subset of securities fraud cases." *Id.* at 124.

The Second Circuit explained that, after a defendant removes an action under SLUSA, the district court must determine whether the action meets "the substantive requirements necessary to sustain removal under SLUSA's preemption provision" (*id.*): "If a district court determines the action is *not* a 'preempted class action' and, therefore, removal was improper, the district court lacks subject matter jurisdiction to further entertain the action." *Id.* at 125. The Second Circuit concluded that, even though the district court in *Spielman* had not expressly stated that it was remanding for lack of jurisdiction, because the court had found the plaintiff's claims not to be preempted by SLUSA, its remand order was necessarily based on a lack

of jurisdiction and was not reviewable under § 1447(d). The Second Circuit's decision squarely conflicts with *Kircher I*, which held that a remand order that followed a finding of no preemption was not based on a lack of jurisdiction and *was* reviewable under § 1447(d). As Judge Newman succinctly explained in his *Spielman* concurrence, the issues "of complete preemption and the existence of subject matter jurisdiction . . . are the opposite sides of the same coin." *Id.* at 132.

2. Ninth Circuit – *Abada*

In *Abada*, the Ninth Circuit stated that SLUSA's removal provision "provides for the removal of 'any covered class action' 'based upon the statutory or common law of any State' 'alleging a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security.'" 300 F.3d at 1119 (quoting 15 U.S.C. § 78bb(f)(1) and (2)). The district court in *Abada*, like the district courts in this case, had found that the plaintiffs' claims were not preempted by SLUSA because they were not "in connection with the purchase or sale" of securities.

In accord with the Second Circuit, and in square conflict with the Seventh Circuit, the Ninth Circuit found that the district court's remand order was grounded on the absence of subject-matter jurisdiction and was not reviewable. The court held that, "[i]n order to decide whether it had subject matter jurisdiction, the district court was required to decide whether Abada's claims were completely preempted by SLUSA. Because construction of SLUSA was necessary for the resolution of subject matter jurisdiction, [Ninth Circuit precedent] does not apply to create appellate jurisdiction." *Id.* *See also United Investors*, *supra* (reaffirming the rule of *Abada*).

3. Eleventh Circuit – *Williams*

In *Williams*, decided after *Kircher I*, the Eleventh Circuit addressed whether it could review a district court order remanding a lawsuit that had been removed under SLUSA, but that asserted claims only under federal law.

The Eleventh Circuit found that the lawsuit was a "covered class action" involving a "covered security" as those terms are defined by SLUSA. 389 F.3d at 1186. However, the Eleventh Circuit also found that the lawsuit was not covered by SLUSA's preemption provision, because one of the requirements for preemption is that the action be "based upon the statutory or common law of any State or subdivision thereof." 15 U.S.C. § 77p(b). *See* 389 F.3d at 1188. The Eleventh Circuit observed that SLUSA's removal provision refers to SLUSA's preemption provision. *Id.* at 1189 n.6. The court concluded that, even though the district court never explicitly mentioned subject-matter jurisdiction, its remand order was based on a lack of removal jurisdiction and was not reviewable under § 1447(d). *See id.* at 1190 ("We therefore hold that the district court's remand order based on lack of removal jurisdiction, entered in response to a timely motion to remand, is not reviewable under § 1447(d).").[10] The *Williams* decision thus squarely conflicts with *Kircher I*, which held that, where the district court found that plaintiff's lawsuit was a "covered class action" but was not preempted, its remand order could not be based on a lack of subject-matter jurisdiction, notwithstanding the court's express statements that it was remanding for lack of jurisdiction.

A clear and acknowledged conflict thus exists between the Seventh Circuit and the Second, Ninth, and Eleventh Circuits. The Seventh Circuit has no intention of revisiting its position in light of the views of other circuits, because it recently reaffirmed *Kircher*'s holding that "a district court's remand of a case to state court based on

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[10] In *Riley*, the Eleventh Circuit had stated that, "in order to remove an action to federal court under SLUSA, the removing party must show that (1) the suit is a 'covered class action,' (2) the plaintiffs' claims are based on state law, (3) one or more 'covered securities' has been purchased or sold, and (4) the defendant misrepresented or omitted a material fact '*in connection with the purchase or sale of such security*.'" 292 F.3d at 1342.

SLUSA is appealable." *Disher v. Citigroup Global Markets Inc.*, 419 F.3d 649, 652 (7th Cir. 2005). Moreover, even a circuit that has not yet addressed the issue has similarly recognized the circuit conflict. *See Rowinski v. Salomon Smith Barney Inc.*, 398 F.3d 294, 298 n.2 (3d Cir. 2005) (noting "a division among the courts of appeals on an issue of appellate jurisdiction under SLUSA"). This Court's intervention is necessary to establish the proper interpretation of SLUSA's removal provision and the reviewability of remand orders under SLUSA.

B. The Seventh Circuit's Exercise Of Appellate Jurisdiction Is Inconsistent With This Court's Precedents And The Language Of SLUSA

Not only does the Seventh Circuit's decision conflict with the decisions of three other circuits, it is inconsistent with this Court's precedents. In *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995), the Court stated that § 1447(d) bars appellate review of remands based on grounds recognized in § 1447(c), such as lack of subject-matter jurisdiction. *See id.* at 127-28. That prohibition on appellate review extends not only to remand orders in suits removed under the general removal statute, but also to remand orders in cases removed under any other statute, even if the other statute contains an express remand provision of its own. *See id.* at 128. Moreover, it is immaterial whether the district court's decision that it lacked subject-matter jurisdiction was correct: § 1447(d) precludes review even of jurisdictional decisions that are clearly wrong. *See Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723, 723 (1977) (per curiam).

The district courts in these cases interpreted SLUSA's removal provision to confer removal jurisdiction only over cases preempted by SLUSA, and therefore remanded based on a perceived lack of subject-matter jurisdiction once they determined that petitioners' claims were not preempted. *See, e.g.*, Pet. App. 24a, 26a-27a (Kircher) (stating that "removal is appropriate only if the Court has federal question jurisdiction over Plaintiffs' claims" and

that "SLUSA does not permit removal of Plaintiffs' claims"), 28a, 30a (Dudley) (stating that "[t]hese cases do not belong in the federal district court" and that "they are not removable under SLUSA"), 39a-40a (Parthasarathy), 44a-45a (Potter), 50a-51a (Vogeler), 56a-57a (Jackson), 60a-61a (Spurgeon). Contrary to the Seventh Circuit's assertion, the district judges never held that "[r]emoval of this suit was proper." *Kircher I*, Pet. App. 14a. Even if the district courts were mistaken in their interpretation of SLUSA's removal provision – for example, because the Seventh Circuit is correct that SLUSA authorizes removal of all "covered class actions," not just preempted actions – the district courts' orders were still unreviewable under *Gravitt* and *Things Remembered*. *Kircher I*'s assertion that the district court had found removal to be proper is contrary to the district judges' explicit statements, and the Seventh Circuit's exercise of appellate jurisdiction conflicts with this Court's decisions.

Moreover, the Seventh Circuit's interpretation of SLUSA's removal provision is incorrect and unsupported by the statutory text. As the Second, Ninth, and Eleventh Circuits noted, SLUSA's removal provision cross-references SLUSA's preemption provision. SLUSA does not permit removal of all covered class actions, but of "[a]ny covered class action brought in any State court involving a covered security, *as set forth in subsection (b)*," 15 U.S.C. § 77p(c) (emphasis added), with subsection (b) being the preemption provision. The plain language of the removal provision indicates that Congress intended to authorize removal of those actions that met the requirements for preemption.

The Seventh Circuit's opinion utterly failed to address this language or the three conflicting circuits' interpretations of the removal provision. The Seventh Circuit simply chided the other circuits for being "mesmerized by the word 'jurisdiction.'" *Kircher I*, Pet. App. 16a, instead of recognizing that those courts quite naturally interpreted SLUSA to render removal proper only when an action is

within the scope of § 77p(b). In addition, the Seventh Circuit's insistence (*id.* at 15a) that *only* federal judges may resolve the issue of SLUSA preemption is an unprecedented reading of the statute, unsupported by text or legislative history, that conflicts with settled Supreme Court law regarding the ability of state courts to address a preemption defense. *See, e.g., Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149-50 (1988) ("[W]hen a state proceeding presents a federal issue, even a pre-emption issue, the proper course is to seek resolution of that issue by the state court.").

Finally, the Seventh Circuit advanced a red herring in stating that district courts lack subject-matter jurisdiction "only when Congress has not authorized the federal judiciary to resolve the sort of issue presented by the case," *Kircher I*, Pet. App. 13a (citing *Kontrick v. Ryan*, 124 S. Ct. 906, 914-16 (2004), and *Scarborough v. Principi*, 124 S. Ct. 1856, 1864-65 (2004)). The Seventh Circuit noted that § 77p(d)(4) provides that, "[i]n an action that has been removed from a State court pursuant to subsection (c) of this section, if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court." 15 U.S.C. § 77p(d)(4). According to the Seventh Circuit, that subsection, coupled with SLUSA's removal provision, authorizes federal courts to determine whether an action is preempted by SLUSA. The court below thus reasoned that a remand after a finding of no preemption is not based on a lack of jurisdiction, because Congress has authorized the federal judiciary to resolve the issue of preemption.

That reasoning misses the point by ignoring the statutory language fashioned by Congress. SLUSA specifically confers removal jurisdiction only on preempted actions. The fact that federal courts are "authorized" to resolve the issue of preemption in ruling on a motion to remand stems from the basic principle that federal courts have jurisdiction to determine their own jurisdiction. Under

SLUSA, after a defendant removes a case, a federal court must address the question of preemption to determine whether it has federal-question jurisdiction. A court's remand order based on a finding of no preemption is, for purposes of § 1447(d), no different from any other remand order based on a lack of federal-question jurisdiction following a defendant's removal of a case. The removals in all of the instant cases were initiated by respondents and were found improper by the district courts – not "proper," as *Kircher I* incorrectly asserted, Pet. App. 14a. Nothing in *Kontrick* or *Scarborough* suggests that the district courts' authority to resolve the preemption issue in ruling on motions to remand somehow meant that the courts' remand orders were not based on a lack of jurisdiction.

On the contrary, *Scarborough* explained that the "label" subject-matter jurisdiction refers to statutory prescriptions "'delineating the classes of cases . . . falling within a court's adjudicatory authority.'" *Scarborough*, 124 S. Ct. at 1865 (quoting *Kontrick*, 124 S. Ct. at 915). By ignoring the crucial clause in § 77p(c) – "as set forth in subsection (b)" – the Seventh Circuit missed that, under SLUSA, only that class of cases satisfying the requirements for preemption falls within a federal court's "adjudicatory authority" or removal jurisdiction. The Seventh Circuit thus incorrectly severed the jurisdictional issue from the substantive decision on preemption, when in fact the two "are the opposite sides of the same coin." *Spielman*, 332 F.3d at 132 (Newman, J., concurring).

C. The Reviewability Of Remand Orders Under SLUSA Is An Issue Of Great Importance Warranting This Court's Resolution

The circuit split over the reviewability of remand orders under SLUSA involves the core securities litigation circuits and is unlikely to be resolved without this Court's intervention. The Seventh Circuit concluded that such orders were reviewable in full awareness that two circuits had held to the contrary, and there is no reason to think that the court will alter its view. *See Disher*, 419 F.3d at

652 (declining to revisit the court's decision in *Kircher I*). There is also no reason to think that the Second, Ninth, or Eleventh Circuits will reach a different conclusion regarding SLUSA remand orders based on the reasoning of the Seventh Circuit. Indeed, the Eleventh Circuit determined that such orders were not reviewable after the Seventh Circuit had decided the opposite.

Kircher I pointed out that *Spielman* and *Abada* predated *Scarborough* and *Kontrick*. *See* Pet. App. 16a. However, as explained above, there is no reason to expect *Scarborough* or *Kontrick* to affect the analysis of the Second and Ninth Circuits. Moreover, as *Kircher I* recognized, *see id.*, the Ninth Circuit has reaffirmed the holding of *Abada* after *Kontrick*. *See United Investors*, *supra*.

The reviewability of remand orders under SLUSA is a question of great importance for the administration of the federal courts. That question is central not just in cases involving "holder" claims or market timing, but in the entire range of cases in which plaintiffs successfully contest the applicability of SLUSA's preemption provision. Whether remand orders in such cases are subject to immediate appellate scrutiny has a significant impact not only on the dockets of the federal courts of appeals, but also on the ability of plaintiffs to obtain a timely adjudication of their viable state-law claims. Letting the Seventh Circuit's erroneous decision stand will undermine the "strong congressional policy against review of remand orders," *Things Remembered*, 516 U.S. at 136 (Ginsburg & Stevens, JJ., concurring) (internal quotation marks omitted), unfairly delaying legitimate state-court suits. *See Spielman*, 332 F.3d at 124. In his dissent in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), then-Justice Rehnquist offered a cogent explanation of the reasons for precluding appellate review of remand orders:

> Congress' purpose in barring review of all remand orders has always been very clear – to prevent the additional delay which a removing party may achieve by seeking appellate reconsideration of an

> order of remand. The removal jurisdiction extended by Congress works a significant interference in the conduct of litigation commenced in state court. While Congress felt that making available a federal forum in appropriate instances justifies some such interruption and delay, it obviously thought it was equally important that when removal to a federal court is not warranted the case should be returned to the state court as expeditiously as possible. If this balanced concern is disregarded, federal removal provisions may become a device affording litigants a means of substantially delaying justice.

Id. at 354-55 (Rehnquist, J., dissenting).

This Court's intervention is warranted to prevent defendants from "substantially delaying justice" in class actions that SLUSA does not preempt and to resolve the disagreement among the courts of appeals over the reviewability of SLUSA remand orders.[11] Moreover, this case is a particularly suitable vehicle. Practically, this

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[11] The Class Action Fairness Act of 2005 ("CAFA"), which applies to class action suits commenced on or after February 18, 2005, does not diminish the importance of the jurisdictional question presented. CAFA establishes federal jurisdiction over certain class actions despite the absence of complete diversity of citizenship; permits removal of such actions; and authorizes appellate review of remand orders in such actions. *See* CAFA § 5(a), 119 Stat. 12 (to be codified at 28 U.S.C. § 1453(c)(1)) ("notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed"). CAFA's provisions do *not* apply to "any class action that solely involves . . . a claim . . . concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E))." *Id.* § 4(a)(2), 119 Stat. 11 (to be codified at 28 U.S.C. § 1332(d)(9)(A)); *accord id.* § 5(a), 119 Stat. 13 (to be codified at 28 U.S.C. § 1453(d)). CAFA thus specifically exempts securities class actions: SLUSA continues to govern such actions, and questions about the proper interpretation of SLUSA's preemption and removal provisions are no less important after passage of CAFA. In CAFA, Congress chose not to disturb the balance struck in SLUSA between federal and state prerogatives in securities litigation.

Court will only have the opportunity to determine whether appellate jurisdiction exists over SLUSA remand orders in a case arising from a circuit that answers that question in the affirmative, and the only such circuit is the Seventh.

The Court very recently granted certiorari in *Dabit* to address whether SLUSA preempts claims brought by holders of securities. The Court, however, need not wait for a disposition of *Dabit* before determining whether to grant certiorari in this case. *Dabit* does not involve the jurisdictional question presented here. Moreover, the Court's decision on the merits in *Dabit* will not remedy the conflict in the courts of appeals over whether SLUSA remand orders are reviewable. Whether SLUSA preempts holder claims is wholly independent of the question whether a district court's determination that a claim is not preempted, erroneous or not, is subject to immediate appellate review. *Kircher* is an ideal companion case to *Dabit*. Granting certiorari in both cases will ensure the Court the opportunity to resolve the procedural as well as the substantive confusion regarding the operation of SLUSA's preemption, removal, and remand provisions, 15 U.S.C. § 77p(b), (c), and (d)(4).

II. THIS COURT HAS GRANTED CERTIORARI IN *MERRILL LYNCH V. DABIT* TO DECIDE WHETHER SLUSA PREEMPTS CLAIMS BROUGHT BY HOLDERS OF SECURITIES

When the Seventh Circuit split with three other circuits on whether SLUSA preempts holder claims, it deepened an already-existing confusion throughout the federal judiciary regarding SLUSA's preemptive scope. As one commentator has observed, "[t]he courts have struggled to interpret SLUSA's preemption provision, and the case law is in disarray." Jennifer O'Hare, *Preemption under the Securities Litigation Uniform Standards Act: If It Looks Like a Securities Fraud Claim and Acts Like a Securities Fraud Claim, Is It a Securities Fraud Claim?*, 56 Ala. L. Rev. 325, 326 (2004). This Court's intervention is

required both to clarify the meaning of SLUSA's preemption provision and to ensure that holders of securities who have suffered damages from issuers' unlawful conduct are not stripped of their legitimate state-law claims.

A. The Seventh Circuit's Decision That SLUSA Preempts Holder Claims Squarely Conflicts With The Decisions Of Three Other Circuits

Three circuits have held that state-law claims in connection with the retention of securities fall outside of SLUSA's preemptive scope. The Seventh Circuit acknowledged a clear conflict between its decision below and those of the Second, Eighth, and Eleventh Circuits.

1. Second Circuit - *Dabit*

In *Dabit*, the Second Circuit held that the meaning of "in connection with" under SLUSA was "coterminous" with the meaning of the nearly identical language of § 10(b) and Rule 10b-5, 395 F.3d at 28, and that the purchaser-seller rule of *Blue Chip Stamps* applies as a limit on SLUSA's "in connection with" requirement such that SLUSA does not preempt holding claims. The Second Circuit began by observing that the phrase "in connection with the purchase or sale of a covered security" has been extensively interpreted by the Supreme Court and lower federal courts in the context of § 10(b) and Rule 10b-5 litigation. The Second Circuit explained (*id.* at 36) that application of § 10(b) jurisprudence to SLUSA's language comports with the Act's stated goal of closing the "federal flight" loophole in the PSLRA:

> If the "in connection with" phrase is read to reach the same conduct under SLUSA as it does under § 10(b) and Rule 10b-5, then SLUSA will preempt precisely those state class actions which could be brought as federal actions subject to the heightened requirements of the PSLRA. If it were otherwise, actions might be preempted for meeting all of SLUSA's requirements, including the "in connection with" term, but not be capable of being brought

> under federal law for failure to meet the parallel requirement of Rule 10b-5, a result that the legislative history does not suggest Congress intended to produce in enacting SLUSA.

Finally, the Second Circuit rejected the precise argument endorsed by the Seventh Circuit: that the *Blue Chip Stamps* purchaser-seller rule is simply a judicially fashioned standing rule, not a textually based and substantive limit on the "in connection with purchase or sale" language. The Second Circuit acknowledged that "[t]he limitation on standing to bring private suit for damages for fraud in connection with the purchase or sale of securities is unquestionably a distinct concept from the general statutory and regulatory prohibition on fraud in connection with the purchase or sale of securities." *Id.* at 39. The court, however, found that observation to have "little persuasive force in this context, because SLUSA deals with precisely the category of actions subject to the purchaser-seller rule" (*id.*):

> Once it is agreed that Congress deliberately borrowed SLUSA's "in connection with" language from § 10(b), the fact that the standing rule is analytically distinct from the underlying prohibition on fraud does not compel the conclusion that SLUSA preempts more than the purchaser/seller category of private damages claims over which the "in connection with" source language operates. Because *only* purchasers and sellers have a federal private damages remedy, it is far more natural to suppose that Congress meant to import the settled standing rule along with the "in connection with" phrase as a substantive standard. Nor are we moved by the observation that the standing rule is merely a judge-made gloss on the statute and the Rule, because private Rule 10b-5 damages actions are themselves a creature of judicial implication.

Id. at 39-40.

The Second Circuit concluded that SLUSA's "wholesale importation" of the language that gave rise to the "balancing judgment" of *Blue Chip Stamps* – namely, the judgment that "the judicially-adopted bar on federal non-purchaser and non-seller claims was counterbalanced by the existence of remedies under state law" – must "be presumed to represent a ratification of that judgment." *Id.* at 40. In sum, the Second Circuit anticipated, thoroughly analyzed, and squarely rejected the Seventh Circuit's reasoning regarding the applicability of SLUSA to holder claims.

2. Eighth Circuit – *Green*

Like the Second Circuit, the Eighth Circuit in *Green* turned to cases construing the identical language in § 10(b) and Rule 10b-5 to interpret the "in connection with the purchase or sale" language in SLUSA. The Eighth Circuit observed that, in *Blue Chip Stamps*, the Court refused to read that language broadly, limiting standing under § 10(b) and Rule 10b-5 to purchasers and sellers of securities. The Eighth Circuit concluded that "nonsellers and nonpurchasers of securities are not covered by SLUSA's preemption provision," because Congress enacted SLUSA in full awareness of the judicial gloss on § 10(b), "which acknowledged that causes of actions for the 'nonpurchase' or 'nonsale' of securities were not covered by the 1934 Act, and that state law would fill those gaps." 279 F.3d at 598 (internal quotation marks omitted). Like the Second Circuit's *Dabit* decision, the Eighth Circuit's decision squarely conflicts with *Kircher II*.

3. Eleventh Circuit – *Riley*

In *Riley*, the Eleventh Circuit concluded, based on the same analysis as the Second and Eighth Circuits, that SLUSA does not preempt claims dealing with the retention of securities, rather than with purchase or sale. *See* 292 F.3d at 1345. The Eleventh Circuit stated that the "in connection with the purchase or sale" language of SLUSA incorporates the meaning of the same phrase in § 10(b) and Rule 10b-5. The Eleventh Circuit further

noted that "[a]nalogizing to § 10b-5 is particularly appropriate because SLUSA was specifically enacted as an amendment to the 1933 and 1934 Acts." *Id.* at 1342.

There is a clear division between the Second, Eighth, and Eleventh Circuits on the one hand, and the Seventh Circuit on the other hand, regarding the applicability of SLUSA's preemption provision to holder claims. Only last month, the Seventh Circuit reaffirmed that, while three other circuits had held that "claims related solely to the *retention* of securities, as opposed to a purchase or sale, . . . are not prempted by SLUSA," it was bound by the decision in *Kircher II* to conclude that such holder claims were preempted by SLUSA. *Disher*, 419 F.3d at 655 (acknowledging conflict with the Second, Eighth, and Eleventh Circuits).

B. The Seventh Circuit's Interpretation Of SLUSA's Preemptive Scope Is Contrary To This Court's *Blue Chip Stamps* Decision And Congressional Intent

The Seventh Circuit's decision is contrary to Supreme Court precedent. In *Blue Chip Stamps*, the Court interpreted § 10(b) and Rule 10b-5 to permit private lawsuits only by purchasers or sellers of securities. The Court made clear that the purchaser-seller rule, far from being untethered to the "in connection with the purchase or sale" language of § 10(b), was an interpretation of that language in the context of private securities litigation. For example, the Court stated that "the wording of § 10(b), making fraud *in connection with the purchase or sale of a security* a violation of the Act, is surely badly strained when construed to provide a cause of action, not to purchasers and sellers of securities, but to the world at large." 421 U.S. at 733 n.5.

Referring to *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir. 1952) – the Second Circuit opinion that originated the purchaser-seller rule – the Court observed that longstanding acceptance of *"Birnbaum's* reasonable interpretation of the wording of § 10(b), wording which is

directed toward injury suffered 'in connection with the purchase or sale' of securities, argues significantly in favor of acceptance of the *Birnbaum* rule by this Court." 421 U.S. at 733 (footnote omitted). The Court added that "[t]he wording of § 10(b) directed at fraud 'in connection with the purchase or sale' of securities stands in contrast with the parallel antifraud provision of the 1933 Act. . . . When Congress wished to provide a remedy to those who neither purchase nor sell securities, it had little trouble in doing so expressly." *Id.* at 733-34.

The Court's reliance on policy concerns in *Blue Chip Stamps* "to flesh out the portions of the law with respect to which neither the congressional enactment nor the administrative regulations offer conclusive guidance," *id.* at 737, does not mean that the purchaser-seller rule is not an interpretation of the "in connection with" phrase, albeit one guided by policy as well as text. SLUSA deals with private securities litigation and should be construed consistently with this Court's interpretation of the "in connection with the purchase or sale" language in such litigation. The Seventh Circuit was wrong simply to disregard *Blue Chip Stamps* after recognizing that the "in connection with" language of SLUSA "has the same scope as its antecedent in Rule 10b-5." *Kircher II*, Pet. App. 5a.

The Seventh Circuit's ruling also runs afoul of this Court's presumption against preemption. "'[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action.'" *Bates v. Dow Agro-Sciences LLC*, 125 S. Ct. 1788, 1807 (2005) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). The presumption against preemption applies not only to the question whether Congress intended any preemption at all, but also to questions about the scope of an express preemption statute. *See Medtronic, supra.*

As this Court made clear in *Blue Chip Stamps*, claims based on the retention of securities have traditionally been "available to nonpurchasers and nonsellers under

state law." 421 U.S. at 739 n.9. Nothing in the text or background of SLUSA manifests a clear intent to preempt the state-law holding claims that *Blue Chip Stamps* acknowledged would be preserved. Indeed, the legislative history does not mention holding claims. *See Dabit*, 395 F.3d at 41-42 (discussing historical materials). SLUSA's language, the conference report, and the statements of SLUSA's proponents all indicate that SLUSA aimed to prevent circumvention of the PSLRA and therefore preempted only those claims that could be brought in federal court. The Seventh Circuit's decision to the contrary is inconsistent with *Blue Chip Stamps*, as well as with this Court's preemption jurisprudence.

C. Whether SLUSA Preempts Holder Claims Is An Issue Of Great Importance

As a result of the practice of market timing, tens of millions of investors have suffered a dilution of their securities holdings that is estimated at $5 to $10 billion per year.[12] Under the Seventh Circuit's ruling, even though these investors were injured by unlawful conduct on the part of mutual funds and fund managers, they have no viable claims under either federal or state law. "If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly." *Bates*, 125 S. Ct. at 1801 (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)). Only holders of securities can seek redress for market-timing activity; as explained above, *see supra* p. 9, purchasers and sellers are not injured by market timing. The Seventh Circuit was wrong to suggest that

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[12] *See, e.g.*, Jennifer Barrett, "Inexcusable," MSNBC.com, Nov. 11, 2003 (interview with John Bogle, founder and former CEO of the Vanguard Group, estimating market-timing dilution to cost investors $5 to $10 billion per year), *available at* http://www.msnbc.com/id/3403565/site/newsweek. *See also* Eric Zitzewitz, *Who Cares About Shareholders? Arbitrage-Proofing Mutual Funds*, 19 J.L. Econ. & Org. 245, 260 (2003) ("total annualized dilution in the first three quarters of 2001 can be estimated at $4.9 billion per year").

petitioners could simply redefine the plaintiff classes to include purchasers and sellers, and could then bring their market-timing claims in federal court. *See Kircher II*, Pet. App. 9a. Contrary to the Seventh Circuit's statements, *see id.*, petitioners' claims do not depend on any statements made or omitted in connection with their purchases of the funds' securities. Petitioners do not allege that respondents misled them by failing to disclose the existence of market timing; rather, they allege negligence and recklessness on the part of respondents in failing to protect their investments from market timing. Permitting the Seventh Circuit's ruling to stand would deprive the victims of market timing of any avenue of recourse in the state or federal courts.

Approximately 200 market-timing suits have been filed against mutual funds in the last two years. *See Kircher II*, Pet. App. 9a. This Court's intervention is necessary to ensure that those lawsuits, involving numerous plaintiffs and billions of dollars in damages, are resolved correctly and consistently. Just two days ago, the Court recognized the importance of the questions presented in this case by granting certiorari in *Dabit* to address whether, "as the Seventh Circuit held earlier this month and in direct conflict with the decision below, SLUSA preempts state law class action claims based upon allegedly fraudulent statements or omissions brought solely on behalf of persons who were induced thereby to hold or retain (and not purchase or sell) securities." *Dabit* Pet. at i, No. 04-1371. If the Court does not grant this petition to address the jurisdictional question presented – which is not at issue in *Dabit* – it should at the very least hold the petition pending resolution of *Dabit*, and then grant certiorari on Question 1.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court should hold the petition pending resolution of *Dabit*.

Respectfully submitted,

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September 29, 2005

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 04-1495, 04-1496, 04-1608, 04-1628, 04-1650, 04-1651, 04-1660, 04-1661, 04-2162, 04-2687

CARL KIRCHER AND ROBERT BROCKWAY, INDIVIDUALLY AND ON BEHALF OF A CLASS, ET AL.,
Plaintiffs-Appellees,

v.

PUTNAM FUNDS TRUST AND PUTNAM INVESTMENT MANAGEMENT, LLC, ET AL.,
Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Illinois

[Argued Jan. 7, 2005]

[Decided Apr. 5, 2005]

Before: EASTERBROOK, RIPPLE, and WOOD, Circuit Judges.

EASTERBROOK, Circuit Judge.

Complaints filed in the circuit court of Madison County, Illinois, charge several mutual funds with setting prices in a way that arbitrageurs can exploit. The funds removed the suits to federal court and asked the district judges to dismiss them under the Securities Litigation Uniform Standards Act of 1998 (SLUSA). Instead the federal judges remanded each suit. Last year we held that these remands are appealable. See *Kircher v. Putnam Funds Trust*, 373 F.3d 847 (7th Cir.2004). Now we must decide whether SLUSA blocks litigation in state court. (Plaintiffs

have asked us to overrule our decision about appellate jurisdiction, but their arguments are unpersuasive.)

Mutual funds must set prices at which they sell and redeem their own shares once a day, and must do so at the net asset value of the funds' holdings. (All of the defendants, which operate in interstate and international commerce, are regulated under the Investment Company Act of 1940; we call them "mutual funds" for convenience.) Each defendant sets that price at 4 p.m. Eastern time, shortly after the New York Stock Exchange closes. Orders placed before the close of business that day are executed at this price.

When the funds hold assets that trade in competitive markets, they must value the assets at their market price. 15 U.S.C. § 80a-2(a)(41)(B)(ii), 17 C.F.R. § 270.2a-4(a). Defendants implement this requirement by valuing securities at the closing price of the principal exchange or market in which the securities are traded. For domestic securities this yields a current price; for securities of foreign issuers, however, it may produce a price that is as much as 15 hours old. (European markets close 5 or 6 hours ahead of New York; Asian markets close 12 to 15 hours before New York.)

Many securities trade on multiple markets or over the counter. Stock of a Japanese firm that closes in Tokyo at ¥10,000 might trade in Frankfurt at € 75.22 (equivalent to ¥10,500) between the close in Tokyo and the close in New York – but the mutual fund nonetheless would value each share at ¥10,000, because that was its most recent price in the issuer's home market. If foreign stocks move predominantly up during this interval (or if one foreign security moves substantially higher), the mutual fund as a whole would carry a 4 p.m. price below what would be justified by the latest available information, and an arbitrageur could purchase shares before 4 p.m. with a plan to sell the next day at a profit. Likewise arbitrageurs could gain if the foreign stock falls after the close in its home market, and the arbitrageur knows that the U.S. mutual fund will

be overpriced at 4 p.m. relative to the price it is likely to have the next trading day when new information from abroad finally is reflected in the fund's valuation. See Richard L. Levine, Yvonne Cristovici & Richard A. Jacobsen, *Mutual Fund Market Timing*, Federal Lawyer 28 (Jan. 2005).

A short-swing-trading strategy would not be attractive unless the foreign securities' prices had moved enough to cover the transactions costs of matched purchases and sales of the mutual fund shares, but for no-load funds that have substantial investments in foreign markets this condition sometimes is satisfied. Arbitrageurs then make profits with slight risk to themselves, diverting gains from the mutual funds' long-term investors while imposing higher administrative costs on the funds (whose operating expenses rise with each purchase and redemption). Plaintiffs contend that the mutual funds acted recklessly in failing to block arbitrageurs from reaping these profits. Available means might include levying fees on short-swing transactions, adopting to a front-end-load charge, reducing the number of trades any investor can execute (or deferring each trade by one day), and valuing the securities of foreign issuers at the most current price in *any* competitive market (organized or over the counter), and not just the closing price on the issuers' home stock exchanges. Some mutual funds have begun to take steps to curtail arbitrage, while disclosing residual vulnerabilities more prominently, but the litigation targets those funds that have not done so (or targets the period before a given fund acted).

SLUSA added to the Securities Act of 1933 and the Securities Exchange Act of 1934 parallel provisions curtailing certain class actions under state law. As in last year's jurisdictional opinion, we limit attention to § 16 of the 1933 Act, 15 U.S.C. § 77p, because the additions to the 1934 Act are functionally identical. See 15 U.S.C. § 78bb. As amended by SLUSA, § 77p(b) reads:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –
>
> (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

Investments in mutual funds are "covered securities," see § 77p(f)(3), and all of these suits are "covered class actions," see § 77p(f)(2), because plaintiffs seek to represent more than 50 investors and each action is direct rather than derivative. (Derivative proceedings are not "covered class actions". See § 77p(f)(2)(B). See also *Burks v. Lasker*, 441 U.S. 471, 99 S.Ct. 1831, 60 L.Ed.2d 404 (1979), and *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991), which note that state-law derivative claims may proceed against federally regulated mutual funds.) Section 77p(d) contains a number of additional exceptions, but plaintiffs do not contend that any of them applies to these actions. Thus everything turns on subsection (b), which forecloses a suit based on state law in which a private class alleges "(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security."

That familiar language comes from Rule 10b-5, 17 C.F.R. § 240.10b-5, which is based on § 10(b) of the 1934 Act, 15 U.S.C. § 78j(b). Rule 10b-5 reads:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Every court of appeals to encounter SLUSA has held that its language has the same scope as its antecedent in Rule 10b-5. *Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25, 34-36 (2d Cir.2005); *Rowinski v. Salomon Smith Barney Inc.*, 398 F.3d 294, 299 (3d Cir.2005); *Green v. Ameritrade, Inc.*, 279 F.3d 590, 596-97 (8th Cir.2002); *Falkowski v. Imation Corp.*, 309 F.3d 1123, 1131 (9th Cir.2002), amended, 320 F.3d 905 (2003); *Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.3d 1334, 1342-43 (11th Cir.2002). We agree with this conclusion. SLUSA is designed to prevent plaintiffs from migrating to state court in order to evade rules for federal securities litigation in the Private Securities Litigation Reform Act of 1995. See *Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116, 122-24 (2d Cir.2003) (discussing how PSLRA and SLUSA work). SLUSA can do its job only if subsection (b) covers those claims that engage Rule 10b-5 (and thus come within the 1995 statute) if presented directly under federal law; this is why SLUSA borrows the Rule's language. Unfortunately, however, the other circuits do not agree among themselves (or with the SEC) what Rule 10b-5 itself means. The phrase "in connection with the purchase or sale" of a security is the sticking point.

The Supreme Court held in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975), that investors who neither purchase nor sell

securities may not collect damages in private litigation under § 10(b) and Rule 10b-5, even if failure to purchase or sell was the result of fraud. Assuming that SLUSA's "in connection with" language means "able to pursue a private right of action after *Blue Chip Stamps*," plaintiffs attempted to frame complaints that avoid any allegations of purchase or sale. All but one of the classes is defined as investors who held shares of a given mutual fund between two specified dates. As an effort to evade SLUSA, this class definition is a flop: some of the investors who held shares during the class period must have purchased their interest (or increased it) during that time; others, who owned shares at the beginning of the period, undoubtedly sold some or all of their investment during the window. Each of the funds has substantial daily turnover, so the class of "all holders" during even a single day contains many purchasers and sellers. All of these class actions therefore must be dismissed. (Plaintiffs do not contend that any *other* part of SLUSA is pertinent; in particular, they did not argue in their briefs – and did not maintain at oral argument despite the court's invitation – that their suits allege mismanagement rather than deceit or manipulation. See *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 97 S.Ct. 1292, 51 L.Ed.2d 480 (1977). Counsel for the plaintiffs declined to explain how state law would support a direct action that did not rely on deceit or manipulation. A claim based on mismanagement likely would need to be cast as a derivative action, which none of these suits purports to be. Nor does any of the suits assert that a mutual fund broke a promise, so that state contract law would supply a remedy.)

The complaint in *Spurgeon v. Pacific Life Insurance Co.* avoids this pitfall. It defines the class as all investors who held the fund's securities during a defined period *and* neither purchased nor sold shares during that period. *Blue Chip Stamps* would prevent such a private action from proceeding under Rule 10b-5. Plaintiffs insist that any private action that is untenable after *Blue Chip Stamps*

also is unaffected by SLUSA. The district judge, agreeing with this perspective, remanded *Spurgeon* to state court.

An equation between SLUSA's coverage and the scope of private damages a[illegible]s under Rule 10b-5 has the support of the second ci[illegible] (*Dabit*), the eighth circuit (*Green*), and the eleventh circuit (*Riley*). The ninth circuit (*Falkowski*), by contrast, has written that coverage of SLUSA tracks the coverage of § 10(b) and Rule 10b-5 when enforced by *public* plaintiffs (the SEC or a criminal prosecutor). The third circuit (*Rowinski*) has reserved decision on this issue. The Securities and Exchange Commission filed a brief in *Dabit* as amicus curiae supporting the view that SLUSA tracks the full scope of § 10(b) and Rule 10b-5, not just their enforcement in private actions. The way the *Spurgeon* class has been defined prevents us from following the third circuit's path: we must answer the question rather than postpone its resolution.

To say that SLUSA uses the same language as § 10(b) and Rule 10b-5 is pretty much to resolve the point. Section 10(b) defines a federal crime, and it also permits the SEC to enforce the prohibition through administrative proceedings. Invocation of this anti-fraud rule does not depend on proof that the agency or United States purchased or sold securities; instead the "in connection with" language ensures that the fraud occurs in securities transactions rather than some other activity. See *SEC v. Zandford*, 535 U.S. 813, 821-22, 122 S.Ct. 1899, 153 L.Ed.2d 1 (2002); *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6, 12, 92 S.Ct. 165, 30 L.Ed.2d 128 (1971).

Blue Chip Stamps came out as it did not because § 10(b) and Rule 10b-5 are limited to situations in which the plaintiff itself traded securities, but because a private right of action to enforce these provisions is a judicial creation and the Court wanted to confine these actions to situations where litigation is apt to do more good than harm. The Justices observed that anyone can say that a failure to trade bore some relation to what the issuer did

(or didn't) disclose, but that judges and juries would have an exceedingly hard time knowing whether a given counterfactual claim ("I *would have* traded, if only . . .") was honest. The Court thought it best to limit private actions to harms arising out of actual trading, which narrows the affected class and simplifies proof, while leaving other securities offenses to public prosecutors.

Decisions since *Blue Chip Stamps* reiterate that it deals with private actions alone and does not restrict coverage of the statute and regulation. See *United States v. O'Hagan*, 521 U.S. 642, 664, 117 S.Ct. 2199, 138 L.Ed.2d 724 (1997); *Holmes v. SIPC*, 503 U.S. 258, 284, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992); *United States v. Naftalin*, 441 U.S. 768, 774 n. 6, 99 S.Ct. 2077, 60 L.Ed.2d 624 (1979). By depicting their classes as containing entirely non-traders, plaintiffs do not take their claims outside § 10(b) and Rule 10b-5; instead they demonstrate only that the claims must be left to public enforcement. It would be more than a little strange if the Supreme Court's decision to block private litigation by non-traders became the opening by which that very litigation could be pursued under state law, despite the judgment of Congress (reflected in SLUSA) that securities class actions must proceed under federal securities law or not at all. *Blue Chip Stamps* combined with SLUSA may mean that claims of the sort plaintiffs want to pursue must be litigated as derivative actions or committed to public prosecutors, but this is not a good reason to undercut the statutory language.

Could the SEC maintain an action under § 10(b) and Rule 10b-5 against mutual funds that fraudulently or manipulatively increased investors' exposure to arbitrage? Suppose the funds stated in their prospectuses that they took actions to prevent arbitrageurs from exploiting the fact that each fund's net asset value is calculated only once a day. That statement, if false (and known to be so), could support enforcement action, for the deceit would have occurred in connection with investors' purchases of the funds' securities. Similarly, if these funds had stated

bluntly in their prospectuses (or otherwise disclosed to investors) that daily valuation left no-load funds exposed to short-swing trading strategies, that revelation would have squelched litigation of this kind.

These observations show that plaintiffs' claims depend on statements made or omitted in connection with *their own* purchases of the funds' securities. They could have brought them directly under Rule 10b-5 in federal court (to the extent that the purchases occurred within the period of limitations). Indeed, most of the approximately 200 suits filed against mutual funds in the last two years alleging that the home-exchange-valuation rule can be exploited by arbitrageurs have been filed in federal court under Rule 10b-5. Our plaintiffs' effort to define non-purchaser-non-seller classes is designed to evade PSLRA in order to litigate a securities class action in state court in the hope that a local judge or jury may produce an idiosyncratic award. It is the very sort of maneuver that SLUSA is designed to prevent.

We hold that SLUSA is as broad as § 10(b) itself and that limitations on private rights of action to enforce § 10(b) and Rule 10b-5 do not open the door to litigation about securities transactions under state law. Plaintiffs' claims are connected to their own purchases of securities and thus are blocked by SLUSA, whose preemptive effect is not confined to knocking out state-law claims by investors who have *winning* federal claims, as plaintiffs suppose. It covers both good and bad securities claims – *especially* bad ones. The judgments of the district courts are reversed, and the cases are remanded with instructions to undo the remand orders and dismiss plaintiffs' state-law claims.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-1495

CARL KIRCHER AND ROBERT BROCKWAY,
INDIVIDUALLY AND ON BEHALF OF A CLASS,
Plaintiffs-Appellees,

v.

PUTNAM FUNDS TRUST AND
PUTNAM INVESTMENT MANAGEMENT, LLC,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Illinois

[Submitted May 26, 2004]

[Decided June 29, 2004]

Before: EASTERBROOK, EVANS, and WILLIAMS, Circuit Judges.

EASTERBROOK, Circuit Judge.

Plaintiffs own shares in Putnam Funds Trust, a mutual fund regulated by the Securities and Exchange Commission under statutes such as the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Company Act of 1940. Contending that the fund and its investment adviser (Putnam Investment Management) had engaged in misconduct that reduced the value of their shares, plaintiffs filed suit in state court, invoking state law alone. They propose to represent a class of the Fund's investors. By forswearing reliance on federal law plaintiffs hope to avoid the strictures of federal statutes such as the Private Securities Litigation Reform Act of 1995.

Similar maneuvers by other investors in the wake of the 1995 statute led Congress to enact the Securities Litigation Uniform Standards Act of 1998. This statute, usually known by its ungainly acronym SLUSA, blocks many class actions based on state law when the issuers are covered by the federal securities laws. Preemption normally is an affirmative defense, to be evaluated by the court in which the plaintiff elects to sue. See, e.g., *Franchise Tax Board of California v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983). SLUSA departs from the norm by permitting defendants to remove so that a federal court may evaluate the defense in advance of any step in the state litigation. See 15 U.S.C. §§ 77p(c), 78bb(f)(2). If the federal court determines that the claim is preempted, it dismisses the suit; otherwise it remands for proceedings under state law. 15 U.S.C. §§ 77p(b), (d)(4), 78bb(f)(1), (3)(D).

Defendants removed this suit under § 77p(c). (From here on, we mention only § 77p; provisions in § 78bb are functionally identical.) They asked the district judge to find the action foreclosed by § 77p(b), which provides:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –
>
> (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

The district court concluded that the proceeding is a "covered class action" because plaintiffs seek damages on behalf of more than 50 investors. (Section 77p(f)(2)(A) provides the full definition of "covered class action.") But the judge concluded that the suit is not affected by § 77p(b) because plaintiffs do not allege loss "in connection with the purchase or sale" of securities; they have held throughout

the class period and claim to be injured by events that diminished the value realized by all investors. The court's conclusion that § 77p(b) does not thwart plaintiffs' claims required a remand under the terms of § 77p(d)(4):

> In an action that has been removed from a State court pursuant to subsection (c), if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.

In the opinion's final paragraph, the district judge added: "Because the Court lacks subject matter jurisdiction, the Court REMANDS this action to the Madison County, Illinois Circuit Court." (Capitalization and boldface in original.) This sentence had led to the dispute that requires our resolution.

Because it ends the litigation in federal court, a remand is a "final decision" that may be appealed under 28 U.S.C. § 1291. See *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 711-15, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996). Defendants filed a timely notice of appeal from the district court's remand. But we must reckon with 28 U.S.C. § 1447(d), which says that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." In *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976), the Court held that § 1447(d) is not as sweeping as its language suggests; instead, the Justices concluded, it blocks review only when the district court acts under the authority granted by § 1447(c) or an equivalent statute. See *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 116 S.Ct. 494, 133 L.Ed.2d 461 (1995), which recapitulates the Court's views on § 1447(d).

Lack of subject-matter jurisdiction is a ground on which remand is authorized (indeed, required) by § 1447(c), and accordingly a district judge's conclusion that jurisdiction is lacking is not subject to appellate review. See, e.g., *Gravitt v. Southwestern Bell Telephone Co.*, 430 U.S. 723, 97 S.Ct. 1439, 52 L.Ed.2d 1 (1977); *Rubel v. Pfizer Inc.*,

361 F.3d 1016 (7th Cir.2004); *Adkins v. Illinois Central R.R.*, 326 F.3d 828 (7th Cir.2003); *Phoenix Container, L.P. v. Sokoloff*, 235 F.3d 352 (7th Cir.2000). Section 77p(d)(4), by contrast, is not within § 1447(c) or equivalent to it, for a remand under § 77p(d)(4) comes at the end rather than the outset of federal adjudication. The Supreme Court has itself reviewed remand decisions that fall outside the scope of § 1447(c). *Quackenbush* and *Thermtron* are two; *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988), is another. We must decide how this situation fits.

One possibility is that the district judge's use of the word "jurisdiction" is conclusive. We held in *Rubel* and *Phoenix Container* that a court may not look behind a jurisdictional remand to examine the reasons why the district judge thought jurisdiction lacking; plaintiffs say that the same principle applies here. Yet defendants do not want us to pierce an ultimate conclusion in order to get at the intermediate steps in the syllogism. Their point, rather, is that "jurisdiction" is a word of many shadings, and that judges sometimes use the word "jurisdiction" or the phrase "subject-matter jurisdiction" when they mean something else. Twice in the past few months the Supreme Court has observed that a court lacks "subject-matter jurisdiction" only when Congress has not authorized the federal judiciary to resolve the sort of issue presented by the case (or the Constitution forbids adjudication). See *Kontrick v. Ryan*, 540 U.S. 443, ---- - ----, 124 S.Ct. 906, 914-16, 157 L.Ed.2d 867 (2004); *Scarborough v. Principi*, 541 U.S. 401, ---- - ----, 124 S.Ct. 1856, 1864-65, 158 L.Ed.2d 674, ---- - ---- (2004). There may be many other reasons why a court should not resolve a dispute, but these differ from the lack of subject-matter jurisdiction.

In *Gravitt*, *Rubel*, *Adkins*, and *Phoenix Container* the district judges held that removal was improper; the litigation never should have come to federal court. That is not, however, what the district judge found here. Because plaintiffs represent more than 50 investors, this is a

"covered class action" and a federal judge is not only authorized but also required to decide whether any court may entertain the litigation. A conclusion that a suit is not a "covered class action" (say, because just 40 investors stand to recover damages) would imply that removal had been improper, and such a decision would come within § 1447(d).

Removal of this suit was proper, the district judge held; that is why the court proceeded to the question how § 77p(b) affects the litigation. Only after making the substantive decision that Congress authorized it to make did the district court remand. After making the decision required by § 77p(b), the district court had nothing else to do: dismissal and remand are the only options. Perhaps one could say that jurisdiction evaporated at that juncture, but that would be tautological. Once a court does all that the statute authorizes, there is no adjudicatory competence to do more. That is not the "lack of subject-matter jurisdiction" that authorizes a remand. Otherwise every federal suit, having been decided on the merits, would be dismissed "for lack of jurisdiction" because the court's job was finished. Cf. *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946).

We must distinguish between a decision that "this court lacks adjudicatory competence" and a decision that "the court has been authorized to do X and having done so should bow out." The former implies lack of subject-matter jurisdiction, as *Kontrick* and *Scarborough* explain; the latter implies the presence of jurisdiction. A good example of the second category is a suit under federal law with a state-law claim supported by the supplemental jurisdiction. 28 U.S.C. § 1367. District courts should relinquish supplemental jurisdiction under certain circumstances, remanding to state court if the suit originated there. 28 U.S.C. §§ 1367(c), 1441(c). We know from *Carnegie-Mellon* that § 1447(d) does not foreclose review of such a remand. In both *Carnegie-Mellon* and *Quackenbush* the district judge found the removal proper but

concluded that the state court should handle some issues. In *Carnegie-Mellon* the remand reflected limits to the supplemental jurisdiction, and in *Quackenbush* the district judge concluded that abstention was appropriate so that the state judiciary could resolve points of state law. In both cases the Supreme Court reviewed the decision on the merits, treating a remand as unaffected by § 1447(d) when the propriety of the removal was not in doubt.

This suit was properly removed. The district judge made a substantive decision under authority granted by a federal statute. It follows that the remand is unaffected by § 1447(d). This makes practical sense too. The goal of that statute is that a contest about what forum should resolve the dispute be wrapped up quickly, so that the litigation can get under way. Appellate consideration of what amounts to a venue dispute slows things down to little good end, for the state court is competent to address the merits. SLUSA means, however, that one specific substantive decision in securities litigation must be made by the federal rather than the state judiciary. Appellate review of decisions under § 77p(b) will promote accurate and consistent implementation of that statute, at little cost in delay beyond what the authorized removal itself creates. Yet if the remand is deemed non-appealable, then a major substantive issue in the case will escape review – for SLUSA ensures that only the federal judiciary makes the § 77p(b) decision. Normal remands, for which § 1447(d) is designed, leave all substantive issues open to plenary resolution in the state court (and, if necessary, the Supreme Court of the United States). That's not how SLUSA works; it is now or never for appellate review of the question whether an action under state law is preempted. In the unusual securities class action where expedition is vital, we can accelerate the appeal's disposition. See *Abney v. United States*, 431 U.S. 651, 662 & n. 8, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977).

We recognize that two courts of appeals have held that disputes about the application of § 77p and § 78bb cannot

be resolved by federal appellate judges. See *Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116 (2d Cir.2003); *United Investors Life Insurance Co. v. Waddell & Reed, Inc.*, 360 F.3d 960 (9th Cir.2004); *Abada v. Charles Schwab & Co.*, 300 F.3d 1112 (9th Cir.2002). All of these decisions precede *Scarborough*, and although *United Investors* came a month after *Kontrick* the court did not discuss it. Both the second and the ninth circuits were mesmerized by the word "jurisdiction" and did not see the difference between a case that never should have been removed and a case properly removed and remanded only when the federal job is done.

Suits that the district court itself finds to have been properly removed are unaffected by § 1447(d). That's the upshot of *Carnegie-Mellon* and *Quackenbush*. "[W]e understand *Carnegie-Mellon* to permit review when the district court believes that removal was proper and that later developments authorize remand." *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708-09 (7th Cir.1992). *Adkins* qualifies this statement with the observation that if the "later development" is one that demonstrates the impropriety of removal in the first place, then § 1447(d) applies. 326 F.3d at 832-34. Here, however, later developments did not undercut the propriety of the removal; the only pertinent development is that the district court completed its appointed task. Thus the principle of *Amoco Petroleum Additives* covers our situation. *Adkins* observes that this principle enjoys the support of the fourth, fifth, and eleventh circuits too.

Technically this opinion creates a conflict among the circuits about appellate review of decisions under SLUSA, so we have circulated it before release to all active judges under Circuit Rule 40(e). But our disposition reflects nothing more than application of settled circuit law to a different substantive statute. We could not follow the second and ninth circuits without overruling *Amoco Petroleum Additives* and later decisions in this circuit. Because *Amoco Petroleum Additives* has the support of at least three other

circuits – not to mention *Things Remembered* and *Quackenbush* – overruling would be inappropriate. On the Rule 40(e) poll, none of the active judges favored a hearing en banc.

The appeal is within our appellate jurisdiction and will proceed to briefing and decision on the merits.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 04-1496 & 04-1608

STEVE DUDLEY AND BETH DUDLEY,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs-Appellees,

v.

PUTNAM INTERNATIONAL EQUITY FUND,
PUTNAM INVESTMENT MANAGEMENT, LLC,
AND PUTNAM INVESTMENT FUNDS,
Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Illinois
No. 03 C 852
G. Patrick Murphy, Chief Judge

[Decided June 30, 2004]

ORDER

Before: EASTERBROOK, EVANS, and WILLIAMS, Circuit Judges.

This consolidated appeal is within our appellate jurisdiction and will proceed to briefing and merits. *See Kircher v. Putnam Funds Trust*, No. 04-1495, slip op. (7th Cir. June 29, 2004).

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-1628

T.K. PARTHASARATHY, EDMUND WOODBURY, AND STUART A. SMITH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs-Appellees,

v.

ARTISAN FUNDS, INC., A CORPORATION, AND ARTISAN PARTNERS LIMITED PARTNERSHIP,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Illinois
No. 03 C 673
David R. Herndon, Judge

[Decided June 30, 2004]

ORDER

Before: EASTERBROOK, EVANS, and WILLIAMS, Circuit Judges.

This consolidated appeal is within our appellate jurisdiction and will proceed to briefing and merits. *See Kircher v. Putnam Funds Trust*, No. 04-1495, slip op. (7th Cir. June 29, 2004).

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 04-1650 & 04-1651

DOROTHY LUETTINGER AND ROBERT POTTER,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs-Appellees,

v.

SCUDDER INTERNATIONAL FUND, INC., A CORPORATION, AND
DEUTSCHE INVESTMENT MANAGEMENT AMERICAS, INC.,
JANUS INVESTMENT FUND, A BUSINESS TRUST, AND
JANUS CAPITAL MANAGEMENT LLC,
Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Illinois
No. 03 C 692
David R. Herndon, Judge

[Decided June 30, 2004]

ORDER

Before: EASTERBROOK, EVANS, and WILLIAMS, Circuit Judges.

This consolidated appeal is within our appellate jurisdiction and will proceed to briefing and merits. *See Kircher v. Putnam Funds Trust*, No. 04-1495, slip op. (7th Cir. June 29, 2004).

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 04-1660 & 04-1661

GARY VOGELER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellee,

v.

COLUMBIA WANGER ASSET MANAGEMENT L.P. AND COLUMBIA ACORN TRUST,
Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Illinois
No. 03 C 843
David R. Herndon, Judge

[Decided June 30, 2004]

ORDER

Before: EASTERBROOK, EVANS, and WILLIAMS, Circuit Judges.

This consolidated appeal is within our appellate jurisdiction and will proceed to briefing and merits. *See Kircher v. Putnam Funds Trust*, No. 04-1495, slip op. (7th Cir. June 29, 2004).

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-2162

AVERY JACKSON,
Plaintiff-Appellee,

v.

VAN KAMPEN SERIES FUND, INC. AND
VAN KAMPEN INVESTMENT ADVISORY CORPORATION,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Illinois
No. 04 C 56
David R. Herndon, Judge

[Decided June 30, 2004]

ORDER

Before: EASTERBROOK, EVANS, and WILLIAMS, Circuit Judges.

This consolidated appeal is within our appellate jurisdiction and will proceed to briefing and merits. *See Kircher v. Putnam Funds Trust*, No. 04-1495, slip op. (7th Cir. June 29, 2004).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 03-CV-0691-DRH

CARL KIRCHER AND ROBERT BROCKWAY,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs,

v.

PUTNAM FUNDS TRUST, A BUSINESS TRUST,
PUTNAM INVESTMENT MANAGEMENT, LLC,
EVERGREEN INTERNATIONAL TRUST, A BUSINESS TRUST, AND
EVERGREEN INVESTMENT MANAGEMENT COMPANY, LLC,
Defendants.

[Filed Jan. 27, 2004]

MEMORANDUM AND ORDER

HERNDON, District Judge:

I. Introduction and Background

This matter comes before the Court on Plaintiff's motion to remand and corrected motion to remand (Docs. 19 & 26). Because this Court lacks subject matter jurisdiction over Plaintiff's claims, the Court remands this matter to the Madison County, Illinois Circuit Court.

On September 16, 2003, Carl Kircher and Robert Brockway filed this purported class action in the Madison County, Illinois Circuit Court against Putnam Funds Trust, Putnam Investment Management, LLC, Evergreen International Trust, a business trust, and Evergreen

Investment Management Company, LLC (Doc. 2).[1] Plaintiffs are long-term mutual fund investors who claim that the value of their shares were diluted by Defendants' certain practices. Plaintiffs' complaint contains four-counts alleging alternate theories based on state law claims of breach of fiduciary duty.

On October 23, 2003, Defendants removed the case to this Court based on federal question jurisdiction, **28 U.S.C. § 1331**. Specifically, Defendants maintain that Plaintiffs' claims are preempted by the Securities Litigation Uniform Standards Act of 1998, **15 U.S.C. § 77 *et seq.*** ("SLUSA") and that the complaint presents a substantial federal question. Thereafter, Plaintiffs flied a motion to remand.

II. Analysis

Defendants may remove this case to this court only if the federal district courts would have original jurisdiction over the action. **See 28 U.S.C. § 1441; *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987)**. "[T]he burden of establishing federal jurisdiction falls on the party seeking removal." ***Doe v. Allied Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993)**. Defendants do not contend that diversity jurisdiction exists. Thus, removal is appropriate only if the Court has federal question jurisdiction over Plaintiffs' claims.

The general rule is that a plaintiff is the master of his own complaint and can avoid federal question jurisdiction by pleading exclusively state law claims. **See *Caterpillar*, 482 U.S. at 392; *Franchise Tax Bd. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1,**

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[1] Plaintiffs seek to represent the following class: "All persons in the United States who held shares in the Putnam International Growth & Income Fund or Evergreen International Growth Fund for a period of more than fourteen days before redeeming or exchanging them during the period beginning from five years prior to and through the date of the filing of this complaint." (Doc. 2, ¶ 41). To date, no motion to certify the class has been filed. Thus, as of this date, this suit is not proceeding as a class action.

10 103 (1983); *Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983, 986 (7th Cir. 2000). If the plaintiff's claim arises under state law, the mere assertion of federal preemption as a defensive argument – sometimes called "conflict preemption" – will not confer federal question jurisdiction. ***Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. at 63-64 (1987); *Franchise Tax Bd. of Cal.*, 463 U.S. at 9-12**. "Complete preemption," on the other hand, is the doctrine which recognizes that federal law may sometimes so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character. ***Metropolitan Life*, 481 U.S. at 63-64**.

First, Defendants maintain that the allegations in Plaintiffs' complaint satisfy SLUSA's "in connection with" requirement. The Court rejects this argument.

SLUSA provides for the removal to federal court of certain class actions based on state law. **15 U.S.C. § 78bb(f). *Accord Professional Mgt Associates, Inc. Employees' Profit Sharing Plan v. KPMG, LLP*, 335 F.3d 800, 802 (8th Cir. 2003)**. SLUSA was enacted to prevent plaintiffs from seeking to evade the protections that federal law provides against abusive litigation by filing suit in state court. ***Newby v. Enron Corp.*, 338 F.3d 467, 471 (5th Cir. 2003)**. The primary way SLUSA accomplishes this objective is by preempting certain securities fraud class actions brought under state law. ***Id.*** The Eighth Circuit Court of Appeals stated:

> With some exceptions, SLUSA made the federal courts the exclusive fora for most class actions involving the purchase and sale of securities. Primarily, SLUSA mandates that any class action based on an allegation that a "covered security" was sold [or purchased] through misrepresentation, manipulation, or deception shall be removable to federal court.

***Green v. Ameritrade, Inc.*, 279 F.3d 590, 595-596 (8th Cir. 2002)**.

However, not all securities claims are preempted by SLUSA. A party claiming SLUSA preemption must demonstrate that the claim satisfies the following:

> (1) the action is a "covered class action" under SLUSA, (2) the action purports to be based on state law, (3) the defendant is alleged to have misrepresented or omitted a material fact (or to have used or employed any manipulative or deceptive device or contrivance), and the defendant is alleged to have engaged in conduct described by criterion (3) "in connection with" the purchase or sale of a "covered security."

***Id.* at 595 (*citing* 15 U.S.C. §§ 78bb(f)(1)-(2).**

Based on the following, the Court finds that Defendants have not met the fourth requirement for SLUSA preemption. Plaintiffs' claims are not claims "in connection with the purchase or sale of a covered security." There is no claim asserted by a purchaser or seller; the claims are brought by those who held shares. If a claim is not cognizable under Section 10(b)(5) of the Securities and Exchange Act of 1934 because not "in connection the [*sic*] purchase or sale of a covered security," it similarly is not a claim "in connection with the purchase or sale of a covered security" for SLUSA purposes.

Just the other day, the Honorable Michael J. Reagan addressed this exact issue in ***Bradfisch v. Templeton Funds, Inc., et al.*, 03-CV-0760-MJR (January 23, 2004)** and found that SLUSA does *not* preempt state law claims of breach of fiduciary duty.[2] Judge Reagan held:

> "Bradfisch claims dilution of his ownership interests and voting rights. Bradfisch's complaint alleges dilution claims that only a holder of securities can bring. Such claims are not actionable under the Securities and Exchange Act of 1934. State law, not

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[2] The Bradfisch allegations and the allegations of this case are almost identical.

the 1934 Act, provides the remedy sought by Bradfisch and the class of holders he seeks to represent. Bradfisch's claims cannot be removed under SLUSA."

***Bradfisch*, 2003-CV-0760 (Doc. 18, p. 6).** This Court agrees with Judge Reagan's reasoning and finds that SLUSA does not permit removal of Plaintiffs' claims.

Next, Defendants maintain that removal was proper because a substantial federal question is presented on the face of Plaintiffs' complaint, namely the Investment Company Act of 1940, **15 U.S.C. §§ 80a-1, *et seq.* ("ICA").** The Court rejects this argument. Again, the Court agrees with Judge Reagan's ruling in ***Bradfisch*** on this issue. ***Bradfisch*, 2003-CV-0760 (Doc. 18, p. 7).** As in ***Bradfisch***, the Plaintiffs have not asserted claims under the ICA and Defendants have not identified any provision of the ICA which would render their state law claims removable to this Court.

III. Conclusion

Accordingly, the Court **GRANTS** Plaintiffs' motion to remand and corrected motion to remand (Docs. 19 & 26). Because the Court lacks subject matter jurisdiction, the Court **REMANDS** this action to the Madison County, Illinois Circuit Court. Further, the Court **DENIES as moot** Defendants' motion to stay (Doc. 15).

IT IS SO ORDERED.

Signed this 27th day of January, 2004.

/s/ DAVID R. HERNDON
DAVID R. HERNDON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Civil Nos. 03-852-GPM & 03-853-GPM

STEVE DUDLEY AND BETH DUDLEY,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs,

v.

PUTNAM INTERNATIONAL EQUITY FUND,
PUTNAM INVESTMENT MANAGEMENT, LLC, AND
PUTNAM INVESTMENT FUNDS,
Defendants.

[Filed Jan. 27, 2004]

MEMORANDUM AND ORDER

MURPHY, Chief District Judge:

These cases were set for a hearing on Monday, January 26, 2004, but the district court was closed and the hearing was cancelled due to inclement weather. The Court being keenly aware of Plaintiffs' request for prompt consideration of the Court's subject matter jurisdiction in light of a pending transfer to the Judicial Panel on Multidistrict Litigation, the Court will rule without a hearing. These cases do not belong in the federal district court, and there is no reason they should be swept into a massive MDL proceeding.

BACKGROUND

Plaintiffs, Steve and Beth Dudley, filed these actions in the Circuit Court for the Third Judicial Circuit, Madison County, Illinois, on November 10, 2003 (*see* Doc. 2).

Broadly speaking, the Dudleys are long-term mutual fund investors who claim that the value of their shares were diluted by certain Putnam practices. Putnam removed both actions to this Court on December 15, 2003, arguing that both cases are removable pursuant to the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") and that the complaints present a substantial federal question. A timely filed motion to remand followed.

ANALYSIS

"[T]ho burden of establishing federal jurisdiction falls on the party seeking removal." *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993). Courts must interpret removal statutes narrowly and "presume that the plaintiff may choose his or her forum." *Id.* "Any doubt regarding jurisdiction should be resolved in favor of the states." *Id.* (citations om tted). Under the complete preemption doctrine, a state law claim becomes a federal question only when Congress intends that a federal statute completely preempts the field of law. *See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392-93 (1987).

Congress passed the SLUSA in order to "'prevent plaintiffs from seeking to evade the protections that federal law provides against abusive litigation by filing suit in State, rather than federal, courts.' With some exceptions, SLUSA made the federal courts the exclusive fora for most class actions involving the purchase and sale of securities." *In re Lutheran Bhd. Variable Ins. Prods. Co. Sales Practices Litig.*, 105 F. Supp. 2d 1037, 1039 (D. Minn. 2000) (citations omitted). To establish that Plaintiffs' claims fall within SLUSA's preemptive scope, Putnam must show: (1) the action is a "covered class action" under SLUSA, (2) the action purports to be based on state law, (3) the defendant is alleged to have misrepresented or omitted a material fact (or to have used or employed any manipulative or deceptive device or contrivance), and (4) the defendant is alleged to have engaged in conduct described by criterion (3) "in connection with" the purchase or sale of a "covered

security." 15 U.S.C. § 78bb(f)(1)-(2). *See also Green v. Ameritrade, Inc.*, 279 F.3d 590, 596 (8th Cir. 2002).

Here, the Court agrees with the Dudleys that Putnam is unable to establish the fourth requirement for SLUSA preemption. The claims in both complaints are not claims "in connection with the purchase or sale of a covered security." Only *holders* of fund shares have the dilution of ownership interests and voting rights claims asserted in the complaints. The class the Dudleys seek to represent consists only of "long term shareholders," defined as persons who have owned shares for more than fourteen days. (*See* Doc. 2 at ¶ 37.) There is no claim asserted by a purchaser or seller; the claims are brought by those who *held* shares. These claims are not actionable under Section 10(b)(5) of the 1934 Securities and Exchange Act, and they are not removable under SLUSA. *See also Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975).

Finally, the Court questions whether the doctrine of substantial federal question remains viable in light of the Supreme Court's decision in *Beneficial Nat'l Bank v. Anderson*, 123 S. Ct. 2058 (2003). Even if the theory remains viable, these cases do not present a substantial federal question.

CONCLUSION

This Court lacks subject matter jurisdiction over these actions. Accordingly, Plaintiffs' motions to remand (Doc. 5 in both cases) are **GRANTED**, and these actions are **REMANDED** to the Circuit Court for the Third Judicial Circuit, Madison County, Illinois, pursuant to 28 U.S.C. § 1447(c).

IT IS SO ORDERED.

DATED this 27th day of January, 2004.

s/ G. PATRICK MURPHY
G. PATRICK MURPHY
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 03-CV-0673-DRH

T.K. PARTHASARTHY, EDMUND WOODBURY, STUART ALLEN SMITH, AND SHARON SMITH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

T. ROWE PRICE INTERNATIONAL FUNDS, INC., A CORPORATION, T. ROWE PRICE INTERNATIONAL, INC., ARTISAN FUNDS, INC., A CORPORATION, ARTISAN PARTNERS LIMITED PARTNERSHIP, AIM INTERNATIONAL FUNDS, INC., A CORPORATION, AND AIM ADVISORS, INC.,
Defendants.

[Filed Jan. 30, 2004]

MEMORANDUM AND ORDER

HERNDON, District Judge:

I. Introduction

On September 16, 2003, Plaintiffs flied this purported class action in the Madison County, Illinois Circuit Court on behalf of long-term investors of certain mutual funds. On October 3, 2003, Plaintiffs filed a First Amended Complaint in state court asserting claims against T. Rowe Price International Funds, Inc., T. Rowe Price International, Inc. (otherwise referred to herein as "T. Rowe Price Defendants"), Artisan Funds, Inc., Artisan Partners Limited Partnership (otherwise referred to herein as "Artisan

Defendants"), AIM International Funds, Inc., and AIM Advisors, Inc. (otherwise referred to herein as "AIM Defendants").[1]

In Count I, Plaintiff T.K. Parthasarathy ("Parthasarthy") alleges that the Artisan Defendants breached their duties of care owed to owners of the fund by, *inter alia*, failing to implement proper portfolio valuation and share pricing policies. In Count II, Parthasarathy alleges that these Defendants willfully and wantonly breached their duties to investors. In Counts III and IV, respectively, Plaintiff Edmund Woodbury ("Woodbury") makes the same allegations against the T. Rowe Price Defendants. And in Counts V and VI, respectively, Plaintiffs Stuart Allen Smith and Sharon Smith ("Smiths") make the same allegations against the AIM Defendants. Each count seeks compensatory and punitive damages, prejudgment interests, costs, and attorneys' fees "not to exceed $75,000 per plaintiff or class member."

Based on the First Amended Complaint, the T. Rowe Price Defendants and the AIM Defendants filed a Notice of Removal, asserting that subject matter jurisdiction lies under both **28 U.S.C. § 1332**, the diversity statute, and **28 U.S.C. § 1331**, the federal question statute (Doc. 1). On October 23, 2003, the Artisan Defendants filed a consent to that removal (Doc. 16). Thereafter, Plaintiffs filed the instant motion to remand (Doc. 34).[2] Because the Court

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[1] Plaintiffs seek to represent the following class: "[A]ll persons in the United States who have owned shares of T. Rowe Price International, Artisan International [Fund], and AIM European Growth [Fund] for more than fourteen days from the date of purchase to the date of sale (redemption) or exchange ("long-term shareholders"). The class period commences five years prior to the filing of this complaint through the date of filing." (Doc. 2, ¶ 46). To date, no motion to certify the class has been filed. Thus, as of this date, this suit is *not* proceeding as a class action.

[2] The Court notes that Plaintiffs attempted to file a Second Amended Complaint in conjunction with their Reply "[o]ut of an abundance of caution." (Doc. 59, p. 1). The Magistrate Judge denied this motion (Doc. 63). Should Plaintiffs still desire to file a Second

lacks subject matter jurisdiction over Plaintiffs' claims, the Court grants Plaintiffs' motion to remand this matter to the Madison County, Illinois Circuit Court.

II. Background

Each of the Plaintiffs are long-term investors in one of the three mutual funds named as Defendants in this case. Defendants' funds are involved in the purchase of foreign securities principally traded in securities markets outside of the United States. Shares of these open end mutual funds are sold to investors at a price based upon the net asset value ("NAV") per share. NAV depends upon the fluctuating value of the fund's underlying portfolio securities. Defendants set this price once every business day at the close of trading on the New York Stock Exchange at 4:00 p.m. Eastern Time.

Plaintiffs allege that since many of the home markets for the foreign securities in Defendants' asset portfolio trade before Defendants set the NAV, the closing prices used to calculate the NAV are stale and do not reflect the price relevant information available. For example, during the interval that elapses between when Defendants set their share NAV "and release it to the NASD for communication to the public," securities markets in countries such as the United Kingdom, France, Japan, Russia, Hong Kong, Malaysia, Germany, and Australia have already traded for an entire session.

In other words, Plaintiffs allege that by failing to make daily adjustments based upon positive correlations between the upward or downward movements in United States and foreign markets and by choosing to use stale prices in valuing their fund shares and setting the daily NAVs, Defendants have exposed long-term shareholders (such as Plaintiffs) to market timing traders who take advantage of Defendants' stale pricing and obtain excess

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Amended Complaint in light of this Court's ruling, they will have to take this up with the state court.

profits at the expense of shareholders who are non-trading long-term buy-and-hold investors.

III. Analysis

As stated above, Defendants asserts jurisdiction under both the federal diversity and federal question statutes. The Court will address each claim to jurisdiction in turn.

A. Diversity Jurisdiction

The federal diversity statute requires complete diversity between the parties plus an amount in controversy which exceeds $75,000, exclusive of interest and costs. ***See* 28 U.S.C. § 1332**. Complete diversity means that "none of the parties on either side of the litigation may be a citizen of the state of which a party on the other side is a citizen." ***Howell v. Tribune Entertainment Co.*, 106 F.3d 215, 217 (7th Cir. 1997) (citation omitted)**. Here, it appears from the pleadings that complete diversity exists. Therefore, the question is whether Plaintiff's action satisfies the amount in controversy requirement of **28 U.S.C. § 1332(a)**.

The removal statue [*sic*], **28 U.S.C. § 1441**, is construed narrowly, and doubts concerning removal are resolved in favor of remand. ***Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993)**. To remove an action based on federal diversity jurisdiction, a defendant must establish the elements by competent proof showing a reasonable probability that such jurisdiction exists. ***Chase v. Shop 'N Save Warehouse Foods, Inc.*, 110 F.3d 424, 427 (7th Cir. 1997)**. "[S]eparate claims of multiple plaintiffs cannot be aggregated to satisfy the jurisdictional amount requirement." ***Schreiber v. Lugar*, 518 F.2d 1099, 1102 (7th Cir. 1975); *see also Del Vecchio v. Conseco, Inc.*, 230 F.3d 974, 978 (7th Cir. 2000) (applying this "general rule" to class action suits)**. Therefore, the defendant must show that at least one of the plaintiffs has a claim that exceeds the $75,000 threshold.

The status of the case as disclosed by plaintiff's complaint is controlling on the issue as to whether the case is

removable. ***St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 291 (1938)**. If the face of the complaint establishes that the suit cannot involve the necessary amount, the case should be remanded. ***Id.* at 291-92**. "Accepted wisdom" provides that the plaintiff's evaluation of the stakes must be respected when deciding whether a claim meets the amount in controversy requirement for federal diversity jurisdiction. ***Barbers, Hairstyling for Men & Women, Inc. v. Bishop*, 132 F.3d 1203, 1205 (7th Cir. 1997) (*citing St. Paul Mercury*, 303 U.S. at 289)**. In fact, a plaintiff can block removal of an action based upon diversity jurisdiction by simply waiving his right to more. ***See In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 607 (7th Cir. 1997), *cert. denied*, 522 U.S. 1153 (1998)**.

In this case, Plaintiffs' First Amended Complaint expressly disclaims damages in excess of $75,000 per class member. In an effort to meet the $75,000 threshold, Defendants maintain that this case is a derivative action on behalf of the funds in which Plaintiffs' held shares, and that as such, easily exceeds the $75,000 threshold.

As an initial matter, whether a suit is derivative by nature or may be brought by a shareholder in his own right is governed by the law of the state of incorporation. ***See Kennedy v. Venrock Assoc., et al.*, 348 F.3d 584, 589-90 (7th Cir. 2003) (The question whether a suit is derivative by nature or may be brought by a shareholder in his own right is governed by the law of the state of incorporation). *See also Frank v. Hadesman & Frank, Inc.*, 83 F.3d 158, 159 (7th Cir. 1996); *Bagdon v. Bridgestone/Firestone, Inc.*, 916 F.2d 379, 382 (7th Cir. 1990)**. Here, the T. Rowe Price and AIM funds are incorporated in Maryland and the Artisan fund is incorporated in Wisconsin. Thus, Maryland law governs with respect to Plaintiffs' claims against the T. Rowe Price and AIM Defendants and Wisconsin law governs with respect to Plaintiffs' claims against the Artisan Defendants.

Recently the Honorable Michael J. Reagan addressed this exact issue in ***Bradfisch v. Templeton Funds, Inc., et al.*, 03-CV-0760-MJR (January 23, 2004)** and found under Maryland law the plaintiff's claims were direct, not derivative.[3] In reaching this conclusion, Judge Reagan first discussed ***Strougo v. Bassini***, a case central to the parties' dispute:

> In ***Strougo v. Bassini*, 282 F.3d 162, 171 (2d Cir. 2002)**, a plaintiff/shareholder sued the directors and officers of his closed-end mutual fund, alleging that a rights offering was coercive in that it penalized shareholders who did not participate. The district court dismissed the shareholder's direct claims on the ground that the injuries alleged 'applied to the shareholders as a whole.' The United State [*sic*] Court of Appeals for the Second Circuit *reversed* the dismissal.
>
> Applying Maryland law, the Second Circuit concluded that the shareholders could sue the defendants *directly* on the claims resulting from the coercive nature of rights offering.
>
> > [I]n the case of both the participating and non-participating shareholders, it would appear that the alleged injuries were to the shareholders alone and not to the Fund. These harms therefore constitute 'direct' shareholder claims under Maryland law. **The corporation cannot bring the action seeking compensation for these injuries because they were suffered by its shareholder not itself.**
>
> **282 F.3d 175.**

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[3] The *Bradfisch* allegations and the allegations of this case are almost identical.

Judge Reagan concluded:

> The same logic applies in the instant case. [Plaintiffs'] reduced equity value in the fund did not result from a reduction in fund assets but from a reallocation of equity value to the market time traders who bought the fund's undervalued shares. The fund *itself* was not injured by the sale of the undervalued shares. Rather, the injury alleged in the complaint is injury to [Plaintiffs] (and those similarly situated to [them]). Those claims do not clear the $75,000 amount in controversy hurdle. Because the amount in controversy does not suffice, this Court cannot exercise subject matter jurisdiction under the diversity statute, **28 U.S.C. § 1332**.

(Doc. 18, pp. 4-5). This Court agrees with Judge Reagan that under Maryland law these claims are direct, not derivative, and therefore Plaintiffs' claims as to T. Rowe Price and AIM Defendants do not meet the amount in controversy requirement.

This result is also in accord with Wisconsin law. ***See Jorgenson v. Water Works, Inc.*, 630 N.W.2d 230, 233 (Wis. App. Ct. 2001) (holding under Wisconsin law whether a claim must be brought derivatively or may be brought by individually depends upon whether the injury alleged is primarily to the complaining shareholder or primarily to the corporation)**. While the Artisan Defendants attempt to equate these claims with those in ***Flynn v. Merrick*, 881 F.2d 446, 449 (7th Cir. 1989) (finding that shareholders could not pursue a direct claim against that the [*sic*] board of directors for mismanagement of corporate assets that decreased the value of the interest held by shareholders and debenture holders)** and ***Rose v. Schantz*, 201 N.W.2d 593, 597 (Wis. 1972) (dismissing an alternative direct cause of action based on the allegation that the directors impermissibly used corporation funds to pay off debts before due and to redeem stock)**, both these cases are distinguishable and

inapposite to this case. Accordingly, the Court finds that under Wisconsin law Plaintiffs' claims are direct, and therefore Plaintiffs' claims as to the Artisan Defendants do not meet the amount in controversy requirement. In sum, the Court finds that it lacks diversity jurisdiction.

B. Federal Question Jurisdiction

The general rule is that a plaintiff is the master of his own complaint and can avoid federal question jurisdiction by pleading exclusively state law claims. ***See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987); *Franchise Tax Bd. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 10 (1983); *Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983, 986 (7th Cir. 2000)**. If the plaintiff's claim arises under state law, the mere assertion of federal preemption as a defensive argument – sometimes called "conflict preemption" – will not confer federal question jurisdiction. ***Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-4 (1987); *Franchise Tax Bd. of Cal.*, 463 U.S. at 9-12**. "Complete preemption," on the other hand, is the doctrine which recognizes that federal law may sometimes so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character. ***Metropolitan Life*, 481 U.S. at 63-4**.

First, Defendants maintain that the allegations in Plaintiffs' complaint satisfy SLUSA's "in connection with" requirement. The Court rejects this argument.

SLUSA provides for the removal to federal court of certain class actions based on state law. **15 U.S.C. § 78bb(f). *Accord Professional Mgt Associates, Inc. Employees' Profit Sharing Plan v. KPMG, LLP*, 333 F.3d 800, 802 (8th Cir. 2003)**. SLUSA was enacted to prevent plaintiffs from seeking to evade the protections that federal law provides against abusive litigation by filing suit in state court. ***Newby v. Enron Corp.*, 338 F.3d 467, 471 (5th Cir. 2003)**. The primary way SLUSA accomplishes this objective is by preempting certain securities fraud class actions

brought under state law. ***Id.*** The Eighth Circuit Court of Appeals stated:

> With some exceptions, SLUSA made the federal courts the exclusive fora for most class actions involving the purchase and sale of securities. Primarily, SLUSA mandates that any class action based on an allegation that a "covered security" was sold [or purchased] through misrepresentation, manipulation, or deception shall be removable to federal court.

***Green v. Ameritrade, Inc.*, 279 F.3d 590, 595-96 (8th Cir. 2002).**

However, not all securities claims are preempted by SLUSA. A party claiming SLUSA preemption must demonstrate that the claim satisfies the following:

> (1) the action is a 'covered class action' under SLUSA, (2) the action purports to be based on state law, (3) the defendant is alleged to have misrepresented or omitted a material fact (or to have used or employed any manipulative or deceptive device or contrivance), and the defendant is alleged to have engaged in conduct described by criterion, and (4) 'in connection with' the purchase or sale of a 'covered security.'

***Id.* at 595 (*citing* 15 U.S.C. §§ 78bb(f)(1)-(2)).**

Based on the following, the Court finds that Defendants have not met the fourth requirement for SLUSA preemption. Plaintiffs' claims are not claims "in connection with the purchase or sale of a covered security." There is no claim asserted by a purchaser or seller; the claims are brought by those who held shares. If a claim is not cognizable under Section 10(b)(5) of the Securities and Exchange Act of 1934 because it is not "in connection the [*sic*] purchase or sale of a covered security," it similarly is not a claim "in connection with the purchase or sale of a covered security" for SLUSA purposes.

Judge Reagan also addressed this issue in ***Bradfisch*, 03-CV-0760-MJR**, and found that SLUSA does *not* preempt state law claims of breach of fiduciary duty. Judge Reagan held:

> Bradfisch claims dilution of his ownership interests and voting rights. Bradfisch's complaint alleges dilution claims that only a holder of securities can bring. Such claims are not actionable under the Securities and Exchange Act of 1934. State law, not the 1934 Act, provides the remedy sought by Bradfisch and the class of holders he seeks to represent. Bradfisch's claims cannot be removed under SLUSA.

***Bradfisch*, 2003-CV-0760 (Doc. 18, p. 6)**. This Court agrees with Judge Reagan's reasoning and finds that SLUSA does not permit removal of Plaintiffs' claims.

Next, Defendants maintain that removal was proper because a substantial federal question is presented on the face of Plaintiffs' complaint, namely the Investment Company Act of 1940, **15 U.S.C. §§ 80a-1, *et seq.* ("ICA")**. The Court rejects this argument. Again, the Court agrees with Judge Reagan's ruling in ***Bradfisch*** on this issue. ***Bradfisch*, 2003-CV-0760 (Doc. 18, p. 7)**. As in ***Bradfisch***, the Plaintiffs have not asserted claims under the ICA and Defendants have not identified any provision of the ICA which would require their state law claims to be removable to this Court.

IV. Conclusion

Accordingly, the Court **GRANTS** Plaintiffs' motion to remand (Doc. 34). Because the Court lacks subject matter jurisdiction, the Court **REMANDS** this action to the Madison County, Illinois Circuit Court. The Court **DENIES as moot** the Artisan Defendants request for oral arguments (Doc. 70) as well as all other pending motions.

IT IS SO ORDERED.

Signed this 27th day of January, 2004.

/s/ DAVID R. HERNDON
DAVID R. HERNDON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 03-CV-0692-DRH

ROBERT POTTER AND DOROTHY LEUTTINGER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

JANUS INVESTMENT FUND, A BUSINESS TRUST; JANUS CAPITAL MANAGEMENT, LLC; SCUDDER INTERNATIONAL FUND, INC.; DEUTSCHE INVESTMENT MANAGEMENT AMERICAS, INC.,
Defendants.

[Filed Feb. 9, 2004]

MEMORANDUM AND ORDER

HERNDON, District Judge:

I. INTRODUCTION

Before the Court is the motion to remand for lack of subject matter jurisdiction submitted by Plaintiffs (Doc. 26). On September 16, 2003, Plaintiffs filed this suit in the Circuit Court of Madison County, Illinois (Doc. 2). On October 3, 2003, Defendants removed the suit to federal court asserting federal subject matter jurisdiction under **28 U.S.C. § 1332** and under **28 U.S.C. § 1331** based on the purported federal questions concerning the Securities Exchange Act of 1934 (SLUSA), **15 U.S.C. § 78bb** and the Investment Company Act of 1940 (ICA), **15 U.S.C. § 80a-44**. For the following reasons, the Court **GRANTS** Plaintiffs' motion to remand and **REMANDS** this case to the

Circuit Court of Madison County, Illinois, based on lack of subject matter jurisdiction (Doc. 26).

II. BACKGROUND

Plaintiffs are long-term investors in one of the two mutual funds named as defendants in this case. Both funds – Janus Investments Fund and Scudder International Fund (collectively, "the Funds") – are mutual funds which primarily purchase securities that are traded in securities markets outside the United States (Complaint ¶ 16). Such funds are intended for long-term investment, and the defendants have urged investors to invest in the Funds for the long term (*Id.* at ¶ 12). The defendants have marketed the advantages of such long-term ownership of funds (*Id.*). Janus Investment Fund is managed by the Delaware Corporation Janus Capital Management, LLC, and Scudder International Fund is managed by Maryland Corporation Deutsche Investment Management Americas, Inc. Plaintiffs have brought claims against Defendants alleging that Defendants' allowance of short-term buying and selling by some investors wrongfully led to the dilution of Plaintiffs' rights and equity in the Defendants' stocks.

II. Analysis

Defendants may remove this case to this court only if the federal district courts would have original jurisdiction over the action. **See 28 U.S.C. § 1441; *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987).** "[T]he burden of establishing federal jurisdiction falls on the party seeking removal." ***Doe v. Allied Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993).**

The general rule is that a plaintiff is the master of his own complaint and can avoid federal question jurisdiction by pleading exclusively state law claims. ***See Caterpillar*, 482 U.S. at 392; *Franchise Tax Bd. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 10 103 (1983); *Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983, 986 (7th Cir. 2000).** If the plaintiff's claim arises under state law, the mere assertion of federal preemption as a defensive argument – sometimes called

"conflict preemption" – will not confer federal question jurisdiction. ***Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. at 63-64 (1987); *Franchise Tax Bd. of Cal.*, 463 U.S. at 9-12**. "Complete preemption," on the other hand, is the doctrine which recognizes that federal law may sometimes so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character. ***Metropolitan Life*, 481 U.S. at 63-64**.

First, Defendants maintain that the allegations in Plaintiffs' complaint satisfy SLUSA's "in connection with" requirement.

The Court rejects this argument. SLUSA allows removal to federal court of certain class actions based on state law. **15 U.S.C. § 78bb(f)**. ***Accord Professional Mgt Associates, Inc. Employees' Profit Sharing Plan v. KPMG, LLP*, 335 F.3d 800, 802 (8th Cir. 2003)**. SLUSA was enacted to prevent plaintiffs from seeking to evade the protections that federal law provides against abusive litigation by filing suit in state court. ***Newby v. Enron Corp.*, 338 F.3d 467, 471 (5th Cir. 2003)**. The primary way SLUSA accomplishes this objective is by preempting certain securities fraud class actions brought under state law. ***Id.*** The Eighth Circuit Court of Appeals stated:

> With some exceptions, SLUSA made the federal courts the exclusive fora for most class actions involving the purchase and sale of securities. Primarily, SLUSA mandates that any class action based on an allegation that a "covered security" was sold [or purchased] through misrepresentation, manipulation, or deception shall be removable to federal court.

***Green v. Ameritrade, Inc.*, 279 F.3d 590, 595-596 (8th Cir. 2002)**.

However, not all securities claims are preempted by SLUSA. A party claiming SLUSA preemption must demonstrate that the claim satisfies the following:

> (1) the action is a "covered class action" under SLUSA, (2) the action purports to be based on state law, (3) the defendant is alleged to have misrepresented or omitted a material fact (or to have used or employed any manipulative or deceptive device or contrivance), and the defendant is alleged to have engaged in conduct described by criterion (3) "in connection with" the purchase or sale of a "covered security."

***Id.* at 595 (citing 15 U.S.C. §§ 78bb(f)(1)-(2).**

Based on the following, the Court finds that Defendants have not met the fourth requirement for SLUSA preemption. Plaintiffs' claims are not claims "in connection with the purchase or sale of a covered security." There is no claim asserted by a purchaser or seller; the claims are brought by those who held shares. If a claim is not cognizable under Section 10(b)(5) of the Securities and Exchange Act of 1934 because not "in connection the [*sic*] purchase or sale of a covered security," it similarly is not a claim "in connection with the purchase or sale of a covered security" for SLUSA purposes.

Recently, the Honorable Michael J. Reagan addressed this exact issue in ***Bradfisch v. Templeton Funds, Inc., et al.*, 03-CV-0760-MJR (January 23, 2004)** and found that SLUSA does *not* preempt state law claims of breach of fiduciary duty.[1] Judge Reagan held:

> "Bradfisch claims dilution of his ownership interests and voting rights. Bradfisch's complaint alleges dilution claims that only a holder of securities can bring. Such claims are not actionable under the Securities and Exchange Act of 1934. State law, not the 1934 Act, provides the remedy sought by Bradfisch and the class of holders he seeks to represent.

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[1] The Bradfisch allegations and the allegations of this case are almost identical.

> Bradfisch's claims cannot be removed under SLUSA."

***Bradfisch*, 2003-CV-0760 (Doc. 18, p. 6)**. This Court agrees with Judge Reagan's reasoning and finds that SLUSA does not permit removal of Plaintiffs' claims.

Second, Defendants maintain that removal was proper because a substantial federal question is presented on the face of Plaintiffs' complaint, namely the Investment Company Act of 1940, **15 U.S.C. §§ 80a-1, *et seq.* ("ICA")**.

The Court rejects this argument. Again, the Court agrees with Judge Reagan's ruling in ***Bradfisch*** on this issue. ***Bradfisch*, 2003-CV-0760 (Doc. 18, p. 7)**. As in ***Bradfisch***, the Plaintiffs have not asserted claims under the ICA and Defendants have not identified any provision of the ICA which would render their state law claims removable to this Court.

Third, Defendants argue that Plaintiffs' claims are removable based on diversity jurisdiction because their claims are worth more than $75,000. Defendants argue that Plaintiffs' claims are derivative and that consequently their claims are worth the amount the Funds lost – an amount much greater than $75,000.

Again, the Court agrees with Judge Reagan's ruling in ***Bradfisch*** on this issue. ***Bradfisch*, 2003-CV-0760 (Doc. 18, p. 4-5)**. The Court determines that no diversity jurisdiction exists since this is not a derivative action and Plaintiffs' claims individually are not worth more than $75,000. The state of incorporation governs whether a shareholder's action is derivative or based on his individual right. ***See, e.g., Kennedy v. Venrock Assoc.*, 384 F.3d 584, 589 (7th Cir. 2003)**. In this case, Maryland law applies as to Defendants Deutsche Investment Management Americas and Scudder International Fund, Inc., and Delaware law applies as to Defendants Janus Investment Fund and Janus Capital Management, LLC (Doc. 1). Under both Maryland and Delaware corporate law, a plaintiff sues individually as opposed to derivatively when his claim is based on a direct or separate injury to the share-

holder. ***See, e.g., Strougo v. Bassini*, 282 F.3d 162, 171 (2d Cir. 2002) (finding a non-derivative action under Maryland law when "[t]he corporation cannot bring the action seeking compensation for [the] injuries because there [*sic*] were suffered by its shareholders, not itself"): *Kramer v. Western Pac. Indus., Inc.*, 546 A.2d 348, 351 (Del. 1988) (stating "[t]o have standing to sue individually, rather than derivatively on behalf of the corporation, the plaintiff must allege more than an injury resulting from a wrong to the corporation").** In this case, Plaintiffs have based their claims strictly upon the direct and individual harm of stock equity dilution, a claim not actionable by the corporation itself. As such, the corporations losses are not attributable to each Plaintiffs' amount in controversy. In addition, Plaintiffs' complaint disclaims recovery of individual damages in excess of $75,000. Therefore, no diversity jurisdiction exists since Plaintiffs' claims do not amount to more than $75,000.

III. Conclusion

Accordingly, the Court **GRANTS** Plaintiffs' motion to remand (Doc. 26). Because the Court lacks subject matter jurisdiction, the Court **REMANDS** this action to the Madison County, Illinois Circuit Court. Further, the Court **DENIES as moot** all other pending motions (Docs. 15, 28, 54, 56).

IT IS SO ORDERED.

Signed this 9th day of February, 2004.

/s/ DAVID R. HERNDON
DAVID R. HERNDON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 03-CV-0843-DRH

GARY VOGELER, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

COLUMBIA ACORN TRUST AND
COLUMBIA WANGER ASSET MANAGEMENT, LP,
Defendants.

[Filed Feb. 12, 2004]

MEMORANDUM AND ORDER

HERNDON, District Judge:

I. INTRODUCTION

Because this case is exactly alike numerous other cases that have recently been remanded in the Southern District of Illinois, the Court **REMANDS** this case *sua sponte* based on lack of subject matter jurisdiction.[1] On November 13, 2003, Plaintiffs filed this suit in the Circuit Court of Madison County, Illinois (Doc. 2). On December 12, 2003, Defendants removed the suit to federal court asserting federal subject matter jurisdiction under **28 U.S.C.**

[1] *See, e.g., Bradfisch v. Templeton Funds, Inc.*, 03-CV-0760, Memorandum and Order, *6 (S.D. Ill. Jan. 23, 2004) (Reagan, J.); *Kircher v. Putnam Funds Trust, et al.*, 03-CV-0691-DRH, Memorandum and Order, *5 (S.D. Ill. Jan. 27, 2004) (Herndon, J.); *Dudley v. Putnam Investment Funds, et al.*, 03-CV-853-GPM, Memorandum and Order (S.D. Ill. Jan. 27, 2004) (Murphy, C.J.).

§ 1331 based on the purported federal questions concerning the Securities Exchange Act of 1934 (SLUSA), **15 U.S.C. § 78bb** and the Investment Company Act of 1940 (ICA), **15 U.S.C. § 80a-44**.

II. BACKGROUND

Plaintiff is a long-term investor in the Columbia Acorn International Fund ("the Fund"), a mutual fund which purchase [*sic*] securities that are traded in securities markets outside the United States (Complaint ¶ 16). Such funds are intended for long-term investment, and the defendants have urged investors to invest in the Funds for the long term (*Id.* at ¶ 12). The defendants have marketed the advantages of such long-term ownership of funds (*Id.*). Plaintiffs have brought claims against Defendants alleging that Defendants' allowance of short-term buying and selling by some investors wrongfully led to the dilution of Plaintiffs' rights and equity in the Defendants' stocks.

Columbia Acorn Trust is a Massachusetts business trust with its principal place of business in Chicago, Illinois (Complaint ¶ 2). Defendant Columbia Wanger Asset Management is a Delaware partnership with is [*sic*] principal place of business in Chicago, Illinois (*Id.* ¶ 3). Defendant Columbia Wanger Asset Management is responsible for managing and supervising Columbia Acorn International's portfolio of securities (*Id.*).

II. Analysis

Defendants may remove this case to this court only if the federal district courts would have original jurisdiction over the action. **See 28 U.S.C. § 1441; *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987)**. "[T]he burden of establishing federal jurisdiction falls on the party seeking removal." ***Doe v. Allied Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993)**.

The general rule is that a plaintiff is the master of his own complaint and can avoid federal question jurisdiction by pleading exclusively state law claims. ***See Caterpillar*, 482 U.S. at 392; *Franchise Tax Bd. v.***

***Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 10 103 (1983); *Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983, 986 (7th Cir. 2000)**. If the plaintiff's claim arises under state law, the mere assertion of federal preemption as a defensive argument – sometimes called "conflict preemption" – will not confer federal question jurisdiction. ***Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. at 63-64 (1987); *Franchise Tax Bd. of Cal.*, 463 U.S. at 9-12**. "Complete preemption," on the other hand, is the doctrine which recognizes that federal law may sometimes so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character. ***Metropolitan Life*, 481 U.S. at 63-64**.

First, Defendants maintain that the allegations in Plaintiffs' complaint satisfy SLUSA's "in connection with" requirement.

The Court rejects this argument. SLUSA allows removal to federal court of certain class actions based on state law. **15 U.S.C. § 78bb(f). *Accord Professional Mgt Associates, Inc. Employees' Profit Sharing Plan v. KPMG, LLP*, 335 F.3d 800, 802 (8th Cir. 2003)**. SLUSA was enacted to prevent plaintiffs from seeking to evade the protections that federal law provides against abusive litigation by filing suit in state court. ***Newby v. Enron Corp.*, 338 F.3d 467, 471 (5th Cir. 2003)**. The primary way SLUSA accomplishes this objective is by preempting certain securities fraud class actions brought under state law. ***Id.*** The Eighth Circuit Court of Appeals stated:

> With some exceptions, SLUSA made the federal courts the exclusive fora for most class actions involving the purchase and sale of securities. Primarily, SLUSA mandates that any class action based on an allegation that a "covered security" was sold [or purchased] through misrepresentation, manipulation, or deception shall be removable to federal court.

***Green v. Ameritrade, Inc.*, 279 F.3d 590, 595-596 (8th Cir. 2002).**

However, not all securities claims are preempted by SLUSA. A party claiming SLUSA preemption must demonstrate that the claim satisfies the following:

> (1) the action is a "covered class action" under SLUSA, (2) the action purports to be based on state law, (3) the defendant is alleged to have misrepresented or omitted a material fact (or to have used or employed any manipulative or deceptive device or contrivance), and the defendant is alleged to have engaged in conduct described by criterion (3) "in connection with" the purchase or sale of a "covered security."

***Id.* at 595 (citing 15 U.S.C. §§ 78bb(f)(1)-(2).**

Based on the following, the Court finds that Defendants have not met the fourth requirement for SLUSA preemption. Plaintiffs' claims are not claims "in connection with the purchase or sale of a covered security." There is no claim asserted by a purchaser or seller; the claims are brought by those who held shares. If a claim is not cognizable under Section 10(b)(5) of the Securities and Exchange Act of 1934 because not "in connection the [*sic*] purchase or sale of a covered security," it similarly is not a claim "in connection with the purchase or sale of a covered security" for SLUSA purposes.

Recently, the Honorable Michael J. Reagan addressed this exact issue in ***Bradfisch v. Templeton Funds, Inc., et al.*, 03-CV-0760-MJR (January 23, 2004)** and found that SLUSA does *not* preempt state law claims of breach of fiduciary duty.[2] Judge Reagan held:

> "Bradfisch claims dilution of his ownership interests and voting rights. Bradfisch's complaint alleges dilution claims that only a holder of securities can

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[2] The Bradfisch allegations and the allegations of this case are almost identical.

bring. Such claims are not actionable under the Securities and Exchange Act of 1934. State law, not the 1934 Act, provides the remedy sought by Bradfisch and the class of holders he seeks to represent. Bradfisch's claims cannot be removed under SLUSA."

***Bradfisch*, 2003-CV-0760 (Doc. 18, p. 6)**. This Court agrees with Judge Reagan's reasoning and finds that SLUSA does not permit removal of Plaintiffs' claims.

Second, Defendants maintain that removal was proper because a substantial federal question is presented on the face of Plaintiffs' complaint, namely the Investment Company Act of 1940, **15 U.S.C. §§ 80a-1, *et seq.* ("ICA")**.

The Court rejects this argument. Again, the Court agrees with Judge Reagan's ruling in ***Bradfisch*** on this issue. ***Bradfisch*, 2003-CV-0760 (Doc. 18, p. 7)**. As in ***Bradfisch***, the Plaintiffs have not asserted claims under the ICA and Defendants have not identified any provision of the ICA which would render their state law claims removable to this Court.

III. Conclusion

Accordingly, the Court **REMANDS** this case *sua sponte* based on lack of subject matter jurisdiction. Further, the Court **DENIES as moot** all other pending motions (Doc. 15, 19, 23, 25).

IT IS SO ORDERED.

Signed this 12th day of February, 2004.

/s/ DAVID R. HERNDON
DAVID R. HERNDON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 04-CV-00056-DRH

AVERY JACKSON, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

VAN KAMPEN SERIES FUND, INC. AND
VAN KAMPEN INVESTMENT ADVISORY CORP.,
Defendants.

[Filed Apr. 1, 2004]

MEMORANDUM AND ORDER

HERNDON, District Judge:

I. Introduction

On December 18, 2003, Avery Jackson filed this purported class action in the Circuit Court of Madison County, Illinois against Van Kampen Series Fund, Inc. ("Van Kampen Funds") and Van Kampen Investment Advisory Corporation ("Van Kampen Advisor") alleging state law claims of breach of fiduciary duty in connection with the dilution of shares he held in certain mutual fund accounts managed by Defendants. **(Doc. 2)**. Defendants removed the case to this Court based on federal question jurisdiction, **28 U.S.C. § 1331**. **(Doc. 1)**.

Now before the Court are Plaintiff's motions to remand for lack of subject matter jurisdiction **(Doc. 13)** and to accelerate briefing and hearing on motion to remand for lack of subject matter jurisdiction. **(Doc. 18)**. As Plaintiff points out, the Court has already had several opportuni-

ties to consider its jurisdiction over allegations virtually identical to those alleged here, and has found it lacked jurisdiction. ***Potter v. Janus Investment Fund, et al.*, 03-CV-00692-DRH (S.D. Ill. Feb. 9, 2004); *Parthasarthy v. T. Rowe Price Int'l Funds, Inc., et al.*, 03-CV-00673-DRH (S.D. Ill. Jan. 30, 2004); *Kircher v. Putnam Funds Trust, et al.*, 03-CV-00691-DRH (S.D. Ill. Jan. 27, 2004).**[1] As in these other cases, the Court rejects Defendants' argument that the Court has jurisdiction under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") or because the Complaint presents a substantial federal question, and remands the matter to the Circuit Court of Madison County, Illinois.

II. Background

Plaintiff is a mutual fund investor who held shares in the funds managed by Defendants for the purpose of long-term investing in international securities. Defendants' funds are involved in the purchase of foreign securities principally traded in securities markets outside of the United States. Shares of these open end mutual funds are sold to investors at a price based upon the net asset value ("NAV") per share. NAV depends upon the fluctuating value of the fund's underlying portfolio securities. Defendants set this price once every business day at the close of trading on the New York Stock Exchange at 4:00 p.m. Eastern Time.

Plaintiff alleges that since many of the home markets for the foreign securities in Defendants' asset portfolio trade before Defendants set the NAV, the closing prices

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[1] The Court's decisions are in accord with those of the other judges in this judicial district. ***See, e.g., Kwiatkowski v. Templeton Growth Fund, Inc., et al.*, 04-CV-0038-GPM (S.D. Ill. Feb. 3, 2004) (Murphy, C.J.); *Woodbury v. Templeton Global Smaller Cos. Fund, Inc., et al.*, 03-00761-GPM (S.D. Ill. Jan. 29, 2004) (Murphy, C.J.); *Dudley v. Putnam Int'l Equity Fund, et al.*, 03-00852-GPM & 03-00853-GPM (S.D. Ill. Jan. 27, 2004) (Murphy, C.J.); *Bradfisch v. Templeton Funds, Inc.*, 03-CV-00760-MJR (S.D. Ill. Jan. 23, 2004) (Reagan, J.).**

used to calculate the NAV are stale and do not reflect the price relevant information available. For example, during the interval that elapses between when Defendants set their share NAV "and release it to the NASD for communication to the public," securities markets in countries such as the United Kingdom, France, Japan, Russia, Malaysia, Germany, and Australia have already traded for an entire session.

In other words, Plaintiff alleges that by failing to make daily adjustments based upon positive correlations between the upward or downward movements in United States and foreign markets and by choosing to use stale prices in valuing their fund shares and setting the daily NAVs, Defendants have exposed long-term shareholders (such as Plaintiff) to market timing traders who take advantage of Defendants' stale pricing and obtain excess profits at the expense of shareholders who are non-trading long-term buy-and-hold investors.

III. Analysis

Defendants may remove this case to this Court only if the federal district courts would have original jurisdiction over the action. ***See* 28 U.S.C. § 1441; *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987)**. "[T]he burden of establishing federal jurisdiction falls on the party seeking removal." ***Doe v. Allied Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993)**. Because Defendants do not contend that diversity exists, removal is appropriate only if Plaintiff's claims arise under federal law. ***See Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069, 1071 (7th Cir. 2004).**

The general rule is that a plaintiff is the master of his own complaint and can avoid federal question jurisdiction by pleading exclusively state law claims. ***See Caterpillar, Inc.*, 482 U.S. at 392; *Franchise Tax Bd. v. Construction Laborers Vacation Trust for S. Cal., et al.*, 463 U.S. 1, 10 (1983); *Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983, 986 (7th Cir. 2000)**. Indeed, "[c]ourts have long recognized . . . that a plaintiff who has both state and federal claims available may avoid federal

court by limiting his or her complaint to only state law claims." ***Fedor*, 355 F.3d at 1071**. If the plaintiff's claim arises under state law, the mere assertion of federal preemption as a defensive argument – sometimes called "conflict preemption" – will not confer federal question jurisdiction. ***Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. at 63-4 (1987); *Franchise Tax Bd. of State of Cal.*, 463 U.S. at 9-12**. "Complete preemption," on the other hand, is the doctrine which recognizes that federal law may sometimes so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character. ***Metropolitan Life*, 481 U.S. at 63-4**.

With this in mind, the Court turns to Defendants' arguments. First, Defendants maintain that the allegations in Plaintiff's Complaint satisfy SLUSA's "in connection with" requirement because the Complaint alleges a "unitary scheme of fraud." SLUSA provides for the removal to federal court of certain class actions based on state law. **15 U.S.C. § 78bb(f)**. ***Accord Professional Mgt Associates, Inc. Employees' Profit Sharing Plan v. KPMG, LLP*, 335 F.3d 800, 802 (8th Cir. 2003)**. SLUSA was enacted to prevent plaintiffs from seeking to evade the protections that federal law provides against abusive litigation by filing suit in state court. ***Newby v. Enron Corp.*, 338 F.3d 467, 471 (5th Cir. 2003)**. The primary way SLUSA accomplishes this objective is by preempting certain securities fraud class actions brought under state law. ***Id.*** The Eighth Circuit Court of Appeals stated:

> With some exceptions, SLUSA made the federal courts the exclusive fora for most class actions involving the purchase and sale of securities. Primarily, SLUSA mandates that any class action based on an allegation that a 'covered security' was sold [or purchased] through misrepresentation, manipulation, or deception shall be removable to federal court.

***Green v. Ameritrade, Inc.*, 279 F.3d 590, 595-596 (8th Cir. 2002).**

However, not all securities claims are preempted by SLUSA. A party claiming SLUSA preemption must demonstrate that the claim satisfies the following:

> (1) the action is a 'covered class action' under SLUSA, (2) the action purports to be based on state law, (3) the defendant is alleged to have misrepresented or omitted a material fact (or to have used or employed any manipulative or deceptive device or contrivance), and the defendant is alleged to have engaged in conduct described by criterion, and (4) 'in connection with' the purchase or sale of a 'covered security.'

***Id.* at 595 (citing 15 U.S.C. §§ 78bb(f)(1)-(2)).** If a claim is not cognizable under Section 10(b)(5) of the Securities and Exchange Act of 1934 because it is not "in connection the [*sic*] purchase or sale of a covered security," it similarly is not a claim "in connection with the purchase or sale of a covered security" for SLUSA purposes.

Here, the Court find [*sic*] Plaintiff's claims are not claims "in connection with the purchase or sale of a covered security" for purposes of SLUSA preemption. Plaintiff alleges negligence and gross negligence in connection with the dilution of shares held in certain mutual fund accounts managed by Defendants. Defendants attempt to characterize Plaintiff's allegations as a "unitary scheme of fraud" does not change this result. As Judge Reagan explained:

> [Plaintiff's] claims dilution of his ownership interests and voting rights. [Plaintiff's] complaint alleges dilution claims that only a holder of securities can bring. Such claims are not actionable under the Securities and Exchange Act of 1934. State law, not the 1934 Act, provides the remedy sought by [Plaintiff] and the class of holders he seeks to represent. [Plaintiff's] claims cannot be removed under SLUSA.

***Bradfisch*, 03-CV-00760 (Doc. 18, p. 6)**. This Court agrees with Judge Reagan's reasoning and finds that SLUSA does not permit removal of Plaintiff's claims.

Second, Defendants maintain that removal was proper because a substantial federal question is presented. As an initial matter, the Court questions whether the doctrine of substantial federal question remains viable in light of the Supreme Court's decision in ***Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003)**. But in any event, the Court finds the doctrine inapplicable here.

IV. Conclusion

Accordingly, the Court **GRANTS** Plaintiff's motion to remand. **(Doc. 13)**. Because the Court lacks subject matter jurisdiction, the Court **REMANDS** this action to the Circuit Court of Madison County, Illinois. The Court **DENIES as moot** Plaintiff's motion to accelerate briefing and hearing on motion to remand for lack of subject matter jurisdiction. **(Doc. 18)**.

IT IS SO ORDERED.

Signed this 1st day of April, 2004.

/s/ DAVID R. HERNDON
DAVID R. HERNDON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Case No. 04-cv-0355-MJR

TERRY SPURGEON,
Plaintiff,

v.

PACIFIC LIFE INS. CO.,
Defendant.

[Filed June 24, 2004]

MEMORANDUM AND ORDER

REAGAN, District Judge:

Terry Spurgeon of Moro, Illinois purchased a "flexible premium deferred variable annuity" from Pacific Life Insurance Company for his son. In May 2004, Spurgeon filed a putative class action suit against Pacific Life in the Circuit Court of Madison County, Illinois. The lawsuit challenges Pacific Life's use of "stale" information to value the assets of the mutual funds in which Pacific Life's annuity sub-accounts are invested.

More specifically, Spurgeon's complaint alleges that Pacific Life negligently calculated the net asset value of sub-accounts, negligently permitted market-timed trades, and breached its fiduciary duty to investors. The complaint, which alleges only state law claims, bears striking similarities to other recently removed class actions challenging portfolio valuation and share pricing policies, such as ***Bradfisch v. Templeton Funds, Inc.*, Case No. 03-cv-0760-MJR**.

One month ago, Pacific Life removed the action to this United States District Court, invoking subject matter jurisdiction under both the federal question and diversity statutes, **28 U.S.C. § 1331, § 1332**. Threshold review of the case raised jurisdictional questions and concerns.

By Order dated May 26, 2004, the Court directed Plaintiff Spurgeon to file a jurisdictional memorandum addressing the arguments presented in Pacific Life's removal notice. Spurgeon did so. *See* Doc. 20. Pacific Life obtained leave to file a reply brief on June 23, 2004. *See* Doc. 25.

Having carefully reviewed the complaint, the jurisdictional allegations in Pacific Life's notice of removal, Spurgeon's responsive jurisdictional memorandum, and Pacific Life's reply brief, the Court determines that subject matter jurisdiction does not lie here.

First, the Court turns to Pacific Life's contention that diversity jurisdiction exists. **28 U.S.C. § 1332** confers original jurisdiction on federal district courts over suits in which the amount in controversy exceeds $75,000, and the action is between citizens of different states. The party invoking federal jurisdiction (here, Pacific Life) bears the burden of demonstrating that all jurisdictional requirements have been met. ***Chase v. Shop 'N Save Warehouse Foods, Inc.*, 110 F.3d 424, 427 (7th Cir. 1997)**.

Pacific Life is a citizen of California, both incorporated and having its principal place of business in that state. Plaintiff Spurgeon is an Illinois citizen.[1] Diversity appears to be complete. However, the amount in controversy does not exceed $75,000.

For a defendant to successfully remove a *class* action based on diversity, at least one of the named plaintiffs must have a claim that surpasses the $75,000 jurisdictional bar. ***In re Brand Name Prescription Drugs An-***

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[1] Spurgeon sues as custodian of his son, James. The pleadings before the Court indicate that, although James was a minor at the time Spurgeon purchased the annuity in question, James was not a minor at the time this suit was filed.

***titrust Litigation*, 123 F.3d 599, 607 (7th Cir. 1997), *cert. denied*, 522 U.S. 1153 (1998); *Garbie v. Daimler-Chrysler Corp.*, 211 F.3d 407, 409 (7th Cir. 2000).** If one named plaintiff meets the jurisdictional minimum, the other named plaintiffs and class members can "piggyback" on that plaintiff's claim, via supplemental jurisdiction under **28 U.S.C. § 1367**. ***Brand Name*, 123 F.3d at 607**.

Spurgeon's complaint expressly states that he and similarly situated investors have suffered damages *less than* $75,000 "per plaintiff or class member, including all compensatory damages and costs." Doc. 2, p. 13. Scrutiny of the complaint confirms that statement. Additionally, Pacific Life cannot aggregate the various Plaintiffs' claims to satisfy the amount-in-controversy requirement. ***See, e.g., Del Vecchio v. Conseco, Inc.*, 230 F.3d 974, 977 (7th Cir. 2000)**. Thus, not all requirements for diversity jurisdiction have been met, and subject matter jurisdiction cannot be exercised via **28 U.S.C. § 1332**.

Similarly unavailing are Pacific Life's invocations of jurisdiction under the federal question statute, **28 U.S.C. § 1331**. Key to the Court's analysis is the characterization of Spurgeon's claims as "dilution" claims. Spurgeon alleges that Pacific Life's use of mutual fund net asset values "based upon stale prices of foreign securities" allows market timers to buy discounted units and thereby dilute the ownership interests of *other* sub-account holders (non market timers like Spurgeon). *See* Doc. 1, ¶ 35. As this Court held in ***Bradfisch*** (and a number of similar decisions), dilution claims brought by *holders* such as Spurgeon are not removable under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), **15 U.S.C. § 77, *et seq.***

SLUSA preempts (and thereby permits removal of) certain securities fraud class actions brought under state law. **15 U.S.C. § 78bb(f); *Professional Mgt Associates, Inc. Employees' Profit Sharing Plan v. KPMG, LLP*, 335 F.3d 800, 802 (8th Cir. 2003); *Newby v. Enron Corp.*, 338 F.3d 467, 471 (5th Cir. 2003)**.

As explained in detail in this Court's January 23, 2004 Order in ***Bradfisch***, though, not *all* state law-based securities claims are preempted by SLUSA. A party claiming SLUSA preemption must establish four criteria: (1) that the action is a "covered class action" under SLUSA; (2) that the action purports to be based on state law; (3) that the defendant is alleged to have misrepresented or omitted a material fact (or to have used a manipulative or deceptive device); and (4) that the defendant is alleged to have engaged in this conduct "in connection with" the purchase or sale of a covered security. ***Green v. Ameritrade, Inc.*, 279 F.3d 590, 595-96 (8th Cir. 2002)**.

If a claim is not cognizable under Section 10(b)(5) of the Securities and Exchange Act of 1934 because it is not a claim "in connection with the purchase or sale of a covered security," then that claim does not meet the fourth prong of the above-stated test (*i.e.*, it is not a claim "in connection with the purchase or sale of a covered security" for SLUSA purposes). Here, Spurgeon brings dilution claims as a *holder* of securities (*i.e.*, a holder of sub-account units). He does not assert any claim as a *purchaser* or *seller* of Pacific Life products. Spurgeon's state law claims are not cognizable under the 1934 Act, and SLUSA does not preempt them.

Nor does the Court find merit in Pacific Life's other preemption arguments for federal question jurisdiction. **28 U.S.C. 1331** confers original jurisdiction on the federal district courts over all civil actions arising under the Constitution or laws of the United States. In assessing the propriety of removal based on federal question jurisdiction, the district court applies the well-pleaded complaint rule, which provides that a "cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law." ***Moran v. Rush Prudential HMO, Inc.*, 230 F.3d 959, 966 (7th Cir. 2000), *citing Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 61 (1987)**.

Under the well-pleaded complaint rule, this Court examines the state court complaint, not the defendant's

response, "to determine whether the plaintiff's claim falls under federal question jurisdiction." ***Id.*** A federal defense to a claim arising under state law does not create jurisdiction "and therefore does not authorize removal." ***Moran*, 230 F.3d at 967, *citing Blackburn v. Sundstrand Corp.*, 115 F.3d 493, 495 (7th Cir.), *cert denied*, 522 U.S. 997 (1997).**

Similarly insufficient is the fact that a federal question may be implicit in a plaintiff's claim. ***See Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993).** Indeed a plaintiff who has both federal and state causes of action may ignore the federal claims and pursue only the state claims in state court. ***Illinois v. Kerr-McGee Chemical Co.*, 677 F.2d 571, 575 (7th Cir.), *cert. denied*, 459 U.S. 1049 (1982).**

Here, Spurgeon's complaint contains only state law claims. Pacific Life, however, maintains (Doc. 1, p. 5): "This Court has federal question jurisdiction because the asserted state law claims are completely preempted by the National Securities Markets Improvements Act of 1996 ("NSMIA"), . . . codified at 15 U.S.C. § 77r, and by the Investment Company Act of 1940 ("ICA"), codified at 15 U.S.C. § 80a-1, *et seq.*"

Sometimes referred to as a corollary to the well-pleaded complaint rule, the "complete preemption doctrine" governs state law claims which Congress has so completely preempted that it is proper to re-cast those state claims as federal claims. ***Moran*, 230 F.3d at 967; *Lister v. Stark*, 890 F.2d 941, 943 n.l (7th Cir. 1989).**

Roughly two years ago, the United States Court of Appeals for the Seventh Circuit reversed this Court's determination that plaintiffs' state law claims in a putative class action were "completely preempted" by federal law and thus properly removed here. The Seventh Circuit instructed this Court to remand the case to Illinois state court for lack of subject matter jurisdiction. ***Rogers v. Tyson Foods, Inc.*, 308 F.3d 785 (7th Cir. 2002).**

Reiterating that the doctrine of complete preemption is a corollary to the well-pleaded complaint rule, the Court declared:

> Complete, or field, preemption exists where "Congress has so completely preempted a particular area that no room remains for any state regulation and the complaint would be 'necessarily federal in character.'" *Bastien v. AT&T Wireless Serv., Inc.*, 205 F.3d 983, 986 (7th Cir. 2000) (quoting *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987)). We find complete preemption where there is a "congressional intent in the enactment of a federal statute not just to provide a federal defense to a state created cause of action but to grant a defendant the ability to remove the adjudication of the cause of action to a federal court *by transforming the state cause of action into a federal cause of action*." 14B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 3722.1 (3d Ed. 1998 & Supp. 2002) . . . .

***Rogers*, 308 F.3d at 787-88 (italics in original).**

The Court continued: "Preemption is what wipes out state law, but the foundation for removal is the creation of federal law to replace state law." ***Id.* at 788**. In simplest terms, the lack of a private right of action under federal law doomed the Rogers defendants' removal attempt: "The 'something more . . . required to create removal jurisdiction' includes a private right of action under the federal statute." ***Id.* at *4**. ***See also Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986) (plaintiff's success depended upon a favorable interpretation of federal drug-safety laws, but state law supplied the right to recover damages; Court held that the presence of a federal issue in a claim that depended on state law did not make the claim one "arising under" federal law).**

In this case at bar, Pacific Life has not addressed this aspect of complete preemption. Pacific Life simply argues

that NSMIA and ICA "wholly displace state jurisdiction over the matters plaintiff raises" (Doc. 1, pp. 5-6). Countering this argument is a provision of ICA which indicates that, in enacting the ICA, Congress intended to preserve existing state law causes of action rather than completely displace them. **15 U.S.C. § 80a-49** provides:

> [N]or shall anything in this subchapter affect the jurisdiction of any other . . . State . . . over any person, security, or transaction, insofar as such jurisdiction does not conflict with any provision of this subchapter or of any rule, regulation, or order hereunder.

Stated simply, the instant case involves state law claims for negligence, gross negligence, and breach of fiduciary duties. Spurgeon's claims neither "arise under" federal law nor are completely preempted by federal law (SLUSA, NSMIA, or ICA). Moreover, as noted above, the amount in controversy does not suffice for jurisdiction to lie under the federal diversity statute.

Because it lacks subject matter jurisdiction, the Court (having permitted the parties to fully brief the issues) sua sponte **REMANDS** this case to the Circuit Court of Madison County, Illinois.

Finally, as Spurgeon's counsel did not request such an award in its jurisdictional brief urging remand, the Court **DECLINES** to charge Pacific Life, under **28 U.S.C. § 1447(c)**, the removal costs incurred by Spurgeon.

IT IS SO ORDERED.

DATED this 24th day of June, 2004.

/s/ MICHAEL J. REAGAN
MICHAEL J. REAGAN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 04-1495, 04-1496, 04-1608, 04-1628, 04-1650, 04-1651, 04-1660, 04-1661, 04-2162, 04-2687

CARL KIRCHER AND ROBERT BROCKWAY, INDIVIDUALLY AND ON BEHALF OF A CLASS, ET AL.,
Plaintiffs-Appellees,

v.

PUTNAM FUNDS TRUST AND PUTNAM INVESTMENT MANAGEMENT, LLC, ET AL.,
Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Illinois

Nos. 03-CV-0691-DRH *et al.*
G. Patrick Murphy, *Chief Judge*, and
David R. Herndon and Michael J. Reagan, *Judges*.

May 2, 2005

Before: EASTERBROOK, RIPPLE, and WOOD, Circuit Judges.

Order

Plaintiffs-appellees filed a petition for rehearing and rehearing en banc on April 19, 2005. No judge in regular active service has requested a vote on the petition for rehearing en banc,* and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

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* Chief Judge Flaum and Judges Rovner and Williams took no part in the consideration of this matter.

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 03-L-1255

CARL KIRCHER AND ROBERT BROCKWAY,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs,

v.

PUTNAM FUNDS TRUST, A BUSINESS TRUST,
PUTNAM INVESTMENT MANAGEMENT, LLC,
EVERGREEN INTERNATIONAL TRUST, A BUSINESS TRUST, AND
EVERGREEN INVESTMENT MANAGEMENT COMPANY, LLC,
Defendants.

[Filed Sept. 16, 2003]

COMPLAINT

* * * * *

17. Studies of world financial markets have established associations between the value changes among various markets. There is a positive correlation between value movements in the United States market and value movements in foreign markets. If the United States market experiences an upward movement in values, it can be predicted that Asian markets will move upward once trading begins their next day. The same upward movement can be predicted for European markets once trading begins their next day. Similarly, if the United States market experiences a downward movement in values, it can be predicted that Asian and European markets will move downward once trading begins their next day. Because of these positive correlations, the closing prices of the foreign

securities in the underlying portfolio may not reflect current market values at the time Defendants set their fund NAV. Appropriate adjustments need to be made to the closing prices of the foreign securities in order to reflect current market values. Despite knowledge of the United States market result, the positive correlations and the stale price of the foreign securities in its underlying portfolio, Defendants do not make any value adjustment to the portfolio's foreign securities prior to calculating fund NAV and setting share price every business day.

* * * * *

32. A significant portion of the underlying foreign securities in the Defendants' portfolios are listed on foreign exchanges and trade during each market's respective session. The NAVs set by Defendants do not take into account on a daily basis any price relevant information that has become available in this two to fourteen and one/half hour interval, after the final prices for the underlying foreign securities have been posted but, prior to the setting of the NAVs. Such price relevant information impacts the valuation of these underlying foreign securities and is significant for valuation because the final market prices have become stale and do not reflect the current market value of the securities.

33. By failing to make daily adjustments based upon positive correlations between upward or downward movements in United States and foreign markets and by choosing to use stale prices in valuing their fund shares and setting their daily NAVs, Defendants have exposed long term shareholders to market timing traders who regularly purchase and redeem Defendants' shares as part of a profitable trading strategy. The market timing trading strategy stems from the ability of market timing traders to predict changes in the NAV. Market timing traders are able to predict changes in the NAV because of the positive correlations between value movements in United States markets and foreign markets. The stale price strategy of market timers who trade Defendants' shares is to buy shares

on days when the United States market moves up and to sell (redeem) shares when the United States market moves down. In order to derive maximum benefit from price relevant information developed subsequent to the now stale closing prices of the portfolio securities, market timers wait until the fund deadline for buying or selling (redeeming) shares in Defendants' funds on any particular business day. Because Defendants cannot buy or sell the foreign securities in the funds' underlying portfolio (due to the time difference between New York and the home markets of the foreign securities) at the time it sets the daily NAV that values the shares it issues and redeems, the shares that Defendants issue to and redeem from market timers do not reflect current market prices of the foreign securities held by the fund.

* * * * *

41. Plaintiffs bring this complaint as a class action against Defendants PUTNAM FUNDS, PUTNAM FUNDS MANAGER, EVERGREEN FUNDS, EVERGREEN FUNDS MANAGER, and pursuant to § 5/2-801 et seq., of the Illinois Code of Civil Procedure individually and on behalf of a class of all persons in the United States who have owned shares in Putnam International Growth & Income or Evergreen International Growth for more than fourteen days from the date of purchase to the date of sale (redemption) or exchange ("long term shareholders"). The class period commences five years prior to the filing of this complaint through the date of filing. Excluded from the class are Defendants, any parent, subsidiary, affiliate, or controlled person of Defendants, as well as the officers, directors, agents, servants or employees of Defendants, and the immediate family member of any such person. Also excluded is any judge who may preside over this case.

* * * * *

Count I

COMES NOW Plaintiff CARL KIRCHER, individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for Count I of his Complaint against Defendants PUTNAM FUNDS TRUST and PUTNAM INVESTMENT MANAGEMENT, LLC, states as follows:

* * * * *

55. Defendants knew, or were negligent in not knowing, that the closing prices for the foreign securities represented in the Putnam International Growth & Income Fund and used by Defendants to calculate NAV for said Fund did not represent fair value because, inter alia, those prices did not reflect changes in trading prices as a result of trading which Defendants knew, or were negligent in not knowing, occurred daily after the closing of the New York Stock Exchange.

56. Defendants breached their duties of due care owed to Plaintiff KIRCHER and similarly situated owners of the Putnam International Growth & Income Fund by, inter alia:

i. failing to properly evaluate on a daily basis whether a significant event affecting the value of Putnam International Growth & Income's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

ii. failing to implement Putnam International Growth & Income's portfolio valuation and share pricing policies and procedures; and

iii. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Putnam International Growth & Income's shares at the expense of long term shareholders.

* * * * *

Count II

COMES NOW Plaintiff CARL KIRCHER, individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for Count II of his Complaint against Defendants PUTNAM FUNDS TRUST and PUTNAM INVESTMENT MANAGEMENT, LLC, states as follows:

* * * * *

60. With utter indifference and conscious disregard for Plaintiff KIRCHER'S investment and the investments of similarly situated fund owners, Defendants willfully and wantonly breached their duties to Plaintiff KIRCHER and similarly situated owners by, inter alia:

i. failing to know and implement applicable rules and regulations concerning the calculation of NAV;

ii. failing to properly evaluate on a daily basis whether a significant event affecting the value of Putnam International Growth & Income's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

iii. failing to implement Putnam International Growth & Income's portfolio valuation and share pricing policies and procedures; and

iv. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Putnam International Growth & Income's shares at the expense of long term shareholders.

* * * * *

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 03-L-1254

ROBERT POTTER AND DOROTHY LEUTTINGER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

JANUS INVESTMENT FUND, A BUSINESS TRUST; JANUS CAPITAL MANAGEMENT, LLC; SCUDDER INTERNATIONAL FUND, INC., A CORPORATION; AND DEUTSCHE INVESTMENT MANAGEMENT AMERICAS, INC.,
Defendants.

[Filed Sept. 16, 2003]

COMPLAINT

* * * * *

17. Studies of world financial markets have established associations between the value changes among various markets. There is a positive correlation between value movements in the United States market and value movements in foreign markets. If the United States market experiences an upward movement in values, it can be predicted that Asian markets will move upward once trading begins their next day. The same upward movement can be predicted for European markets once trading begins their next day. Similarly, if the United States market experiences a downward movement in values, it can be predicted that Asian and European markets will move downward once trading begins their next day. Because of

these positive correlations, the closing prices of the foreign securities in the underlying portfolio may not reflect current market values at the time Defendants set their fund NAV. Appropriate adjustments need to be made to the closing prices of the foreign securities in order to reflect current market values. Despite knowledge of the United States market result, the positive correlations and the stale price of the foreign securities in its underlying portfolio, Defendants do not make any value adjustment to the portfolio's foreign securities prior to calculating fund NAV and setting share price every business day.

* * * * *

32. A significant portion of the underlying foreign securities in the Defendants' portfolios are listed on foreign exchanges and trade during each market's respective session. The NAVs set by Defendants do not take into account on a daily basis any price relevant information that has become available in this two to fourteen and one/half hour interval, after the final prices for the underlying foreign securities have been posted but, prior to the setting of the NAVs. Such price relevant information impacts the valuation of these underlying foreign securities and is significant for valuation because the final market prices have become stale and do not reflect the current market value of the securities.

33. By failing to make daily adjustments based upon positive correlations between upward or downward movements in United States and foreign markets and by choosing to use stale prices in valuing their fund shares and setting their daily NAVs, Defendants have exposed long term shareholders to market timing traders who regularly purchase and redeem Defendants' shares as part of a profitable trading strategy. The market timing trading strategy stems from the ability of market timing traders to predict changes in the NAV. Market timing traders are able to predict changes in the NAV because of the positive correlations between value movements in United States markets and foreign markets. The stale price strategy of market

timers who trade Defendants' shares is to buy shares on days when the United States market moves up and to sell (redeem) shares when the United States market moves down. In order to derive maximum benefit from price relevant information developed subsequent to the now stale closing prices of the portfolio securities, market timers wait until the fund deadline for buying or selling (redeeming) shares in Defendants' funds on any particular business day. Because Defendants cannot buy or sell the foreign securities in the funds' underlying portfolio (due to the time difference between New York and the home markets of the foreign securities) at the time it sets the daily NAV that values the shares it issues and redeems, the shares that Defendants issue to and redeem from market timers do not reflect current market prices of the foreign securities held by the fund.

* * * * *

41. Plaintiffs bring this complaint as a class action against Defendants JANUS FUNDS, JANUS FUNDS MANAGER, SCUDDER FUNDS and SCUDDER FUND MANAGER, and pursuant to § 5/2-801 et seq., of the Illinois Code of Civil Procedure individually and on behalf of a class of all persons in the United States who have owned shares in Janus Overseas or Scudder International for more than fourteen days from the date of purchase to the date of sale (redemption) or exchange ("long term shareholders"). The class period commences five years prior to the filing of this complaint. Excluded from the class are Defendants, any parent, subsidiary, affiliate, or controlled Person of Defendants, as well as the officers, directors, agents, servants or employees of Defendants, and the immediate family member of any such person. Also excluded is any judge who may preside over this case.

* * * * *

Count I

COMES NOW Plaintiff, ROBERT POTTER, individually and on behalf of all others similarly situation [*sic*], by and through his undersigned counsel, and for Count I of his Complaint against Defendants JANUS FUNDS and JANUS FUNDS MANAGER, states as follows:

* * * * *

55. Defendants knew, or were negligent in not knowing, that the closing prices for the foreign securities represented in the Janus Overseas Fund and used by Defendants to calculate NAV for said Fund did not represent fair value because, inter alia, those prices did not reflect changes in trading prices as a result of trading which Defendants knew, or were negligent in not knowing, occurred daily after the closing of the New York Stock Exchange.

56. Defendants breached their duties of due care owed to Plaintiff Potter and similarly situated owners of the Janus Overseas Fund by, inter alia:

i. failing to properly evaluate on a daily basis whether a significant event affecting the value of Janus Overseas' portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

ii. failing to implement Janus Overseas' portfolio valuation and share pricing policies and procedures; and

iii. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Janus Overseas shares' at the expense of long term shareholders.

* * * * *

Count II

COMES NOW Plaintiff, ROBERT POTTER, individually and on behalf of all others similarly situation [*sic*], by and through his undersigned counsel, and for Count II of his Complaint against Defendants JANUS FUNDS and JANUS FUNDS MANAGER, states as follows:

* * * * *

60. With utter indifference and conscious disregard for Plaintiff POTTER'S investment and the investments of similarly situated fund owners, Defendants willfully and wantonly breached their duties to Plaintiff POTTER and similarly situated owners by, inter alia:

i. failing to know and implement applicable rules and regulations concerning the calculation of NAV;

ii. failing to properly evaluate on a daily basis whether a significant event affecting the value of Janus Overseas' portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

iii. failing to implement Janus Overseas' portfolio valuation and share pricing policies and procedures; and

iv. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Janus Overseas' shares at the expense of long term shareholders.

* * * * *

Count III

COMES NOW Plaintiff, DOROTHY LEUTHINGER, individually and on behalf of all others similarly situated, by and through her undersigned counsel, and for Count III of her Complaint against Defendants SCUDDER FUNDS and SCUDDER FUND MANAGER, states as follows:

* * * * *

68. Defendants knew, or were negligent in not knowing, that the closing prices for the foreign securities represented in the Scudder International Fund and used by Defendants to calculate NAV for said Fund did not represent fair value because, inter alia, those prices did not reflect changes in trading prices as a result of trading which Defendants knew, or were negligent in not knowing, occurred daily after the closing of the New York Stock Exchange.

69. Defendants breached their duties of due care owed to Plaintiff LEUTTINGER and similarly situated owners of the Scudder International Fund by, inter alia:

i. failing to properly evaluate on a daily basis whether a significant event affecting the value of Scudder International's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

ii. failing to implement Scudder International's portfolio valuation and share pricing policies and procedures; and

iii. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Scudder International's shares at the expense of long term shareholders.

* * * * *

Count IV

COMES NOW Plaintiff, DOROTHY LEUTTINGER, individually and on behalf of all others similarly situated, by and through her undersigned counsel, and for Count IV of her Complaint against Defendants SCUDDER FUNDS and SCUDDER FUND MANAGER, states as follows:

* * * * *

73. With utter indifference and conscious disregard for Plaintiff's investment and the investments of similarly situated fund owners, Defendants willfully and wantonly

breached their duties to Plaintiff LEUTTINGER and similarly situated owners by, inter alia:

i. failing to know and implement applicable rules and regulations concerning the calculation of NAV;

ii. failing to properly evaluate on a daily basis whether a significant event affecting the value of Scudder International's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

iii. failing to implement Scudder International's portfolio valuation and share pricing policies and procedures; and

iv. allowing portfolio valuation and share pricing policies and procedures which benefitted market timing traders of Scudder International's shares at the expense of long term shareholders.

* * * * *

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 03-L-1253

T.K. PARTHASARTHY, EDMUND WOODBURY, STUART ALLEN SMITH, AND SHARON SMITH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

T. ROWE PRICE INTERNATIONAL FUNDS, INC., A CORPORATION, T. ROWE PRICE INTERNATIONAL, INC., ARTISAN FUNDS, INC., A CORPORATION, ARTISAN PARTNERS LIMITED PARTNERSHIP, AIM INTERNATIONAL FUNDS, INC., A CORPORATION, AND AIM ADVISORS, INC.,
Defendants.

[Filed Oct. 3, 2003]

FIRST AMENDED COMPLAINT

* * * * *

22. Studies of world financial markets have established associations between the value changes among various markets. There is a positive correlation between value movements in the United States market and value movements in foreign markets. If the United States market experiences an upward movement in values, it can be predicted that Asian markets will move upward once trading begins their next day. The same upward movement can be predicted for European markets once trading begins their next day. Similarly, if the United States market experiences a downward movement in values, it can be

predicted that Asian and European markets will move downward once trading begins their next day. Because of these positive correlations, the closing prices of the foreign securities in the underlying portfolio may not reflect current market values at the time Defendants set their fund NAV. Appropriate adjustments need to be made to the closing prices of the foreign securities in order to reflect current market values. Despite knowledge of the United States market result, the positive correlations and the stale price of the foreign securities in its underlying portfolio, Defendants do not make any value adjustment to the portfolio's foreign securities prior to calculating fund NAV and setting share price every business day.

* * * * *

37. A significant portion of the underlying foreign securities in the Defendants' portfolios are listed on foreign exchanges and trade during each market's respective session. The NAVs set by Defendants do not take into account on a daily basis any price relevant information that has become available in this two to fourteen and one/half hour interval, after the final prices for the underlying foreign securities have been posted but, prior to the setting of the NAVs. Such price relevant information impacts the valuation of these underlying foreign securities and is significant for valuation because the final market prices have become stale and do not reflect the current market value of the securities.

38. By failing to make daily adjustments based upon positive correlations between upward or downward movements in United States and foreign markets and by choosing to use stale prices in valuing their fund shares and setting their daily NAVs, Defendants have exposed long term shareholders to market timing traders who regularly purchase and redeem Defendants' shares as part of a profitable trading strategy. The market timing trading strategy stems from the ability of market timing traders to predict changes in the NAV. Market timing traders are able to predict changes in the NAV because of the positive correla-

tions between value movements in United States markets and foreign markets. The stale price strategy of market timers who trade Defendants' shares is to buy shares on days when the United States market moves up and to sell (redeem) shares when the United States market moves down. In order to derive maximum benefit from price relevant information developed subsequent to the now stale closing prices of the portfolio securities, market timers wait until the fund deadline for buying or selling (redeeming) shares in Defendants' funds on any particular business day. Because Defendants cannot buy or sell the foreign securities in the funds' underlying portfolio (due to the time difference between New York and the home markets of the foreign securities) at the time it sets the daily NAV that values the shares it issues and redeems, the shares that Defendants issue to and redeem from market timers do not reflect current market prices of the foreign securities held by the fund.

* * * * *

46. Plaintiffs bring this complaint as a class action against Defendants T. ROWE PRICE FUNDS, T. ROWE PRICE FUND MANAGER, ARTISAN FUNDS, ARTISAN FUND MANAGER, AIM FUNDS, AND AIM FUND MANAGER, and pursuant to § 5/2-801 *et seq.*, of the Illinois Code of Civil Procedure individually and on behalf of a class of all persons in the United States who have owned shares T. ROWE PRICE INTERNATIONAL, ARTISAN INTERNATIONAL, AND AIM EUROPEAN GROWTH for more than fourteen days from the date of purchase to the date of sale (redemption) or exchange ("long term shareholders"). The class period commences five years prior to the filing of this complaint through the date of filing. Excluded from the class are Defendants, any parent, subsidiary, affiliate, or controlled person of Defendants, as well as the officers, directors, agents, servants or employees of Defendants, and the immediate family member of any such person. Also excluded is any judge who may preside over this case.

* * * * *

Count I

COMES NOW Plaintiff T.K. PARTHASARATHY, individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for Count I of his Complaint against Defendants ARTISAN FUNDS and ARTISAN FUND MANAGER, states as follows:

* * * * *

59. Defendants knew, or were negligent in not knowing, that the closing prices for the foreign securities represented in the Artisan International Fund and used by Defendants to calculate NAV for said Fund did not represent fair value because, inter alia, those prices did not reflect changes in trading prices as a result of trading which Defendants knew, or were negligent in not knowing, occurred daily after the closing of the New York Stock Exchange.

60. Defendants breached their duties of due care owed to Plaintiff Parthasarathy and similarly situated owners of the Artisan International Fund by, inter alia:

i. failing to properly evaluate on a daily basis whether a significant event affecting the value of Artisan International's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

ii. failing to implement Artisan International's portfolio valuation and share pricing policies and procedures; and

iii. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Artisan International's shares at the expense of long term shareholders.

* * * * *

Count II

COMES NOW Plaintiff T.K. PARTHASARATHY, individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for Count II of his Complaint against Defendants ARTISAN FUNDS and ARTISAN FUND MANAGER, states as follows:

* * * * *

64. With utter indifference and conscious disregard for Plaintiff Parthasarathy's investment and the investments of similarly situated fund owners, Defendants willfully and wantonly breached their duties to Plaintiff Parthasarathy and similarly situated owners by, inter alia:

i. failing to know and implement applicable rules and regulations concerning the calculation of NAV;

ii. failing to properly evaluate on a daily basis whether a significant event affecting the value of Artisan International's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

iii. failing to implement Artisan International's portfolio valuation and share pricing policies and procedures; and

iv. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Artisan International's shares at the expense of long term shareholders.

* * * * *

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 03-L-1539

STEVE AND BETH DUDLEY,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs,

v.

PUTNAM INTERNATIONAL EQUITY FUND AND
PUTNAM INVESTMENT MANAGEMENT, LLC,
Defendants.

[Filed Nov. 10, 2003]

COMPLAINT

* * * * *

13. Studies of world financial markets have established associations between the value changes among various markets. There is a positive correlation between value movements in the United States market and value movements in foreign markets. If the United States market experiences an upward movement in values, it can be predicted that Asian markets will move upward once trading begins their next day. The same upward movement can be predicted for European markets once trading begins their next day. Similarly, if the United States market experiences a downward movement in values, it can be predicted that Asian and European markets will move downward once trading begins their next day. Because of these positive correlations, the closing prices of the foreign securities in the underlying portfolio may not reflect current market values at the time Defendants set their fund NAV.

Appropriate adjustments need to be made to the closing prices of the foreign securities in order to reflect current market values. Despite knowledge of the United States market result, continuous trading of the world equity indexes, ADRs, foreign currency futures markets and the correlations between the value of the fund's securities and these benchmarks, Defendants do not make any value adjustment to the portfolio's foreign securities prior to calculating fund NAV and setting share price every business day.

* * * * *

28. A significant portion of the underlying foreign securities in the Defendants' fund portfolio are listed on foreign exchanges and trade during each market's respective session. The NAVs set by Defendants do not take into account on a daily basis any price relevant information that has become available in this two to fourteen and one/half hour interval, after the final prices for the underlying foreign securities have been posted but, prior to the setting of the NAVs. Price relevant information, such as the continuous trading of world equity market indexes, ADRs, and foreign currency futures impacts the valuation of these underlying foreign securities and is significant for valuation because the final market prices have become stale and do not reflect the current market value of the securities.

29. By failing to make daily adjustments based upon positive correlations between upward or downward movements in United States and foreign markets and by choosing to use stale prices in valuing their fund shares and setting their daily NAVs, Defendants have exposed long term shareholders to market timing traders who regularly purchase and redeem Defendants' shares as part of a profitable trading strategy. The market timing trading strategy stems from the ability of market timing traders to predict changes in the NAV. Market timing traders are able to predict changes in the NAV because of the positive correlations between value movements in United States markets

and foreign markets. The stale price strategy of market timers who trade Defendants' fund shares is to buy shares on days when the United States market moves up and to sell (redeem) shares when the United States market moves down. In order to derive maximum benefit from price relevant information developed subsequent to the now stale closing prices of the portfolio securities, market timers wait until the fund deadline for buying or selling (redeeming) shares in Defendants' funds on any particular business day. Because Defendants cannot buy or sell the foreign securities in the fund's underlying portfolio (due to the time difference between New York and the home markets of the foreign securities) at the time it sets the daily NAV that values the shares it issues and redeems, the shares that Defendants issue to and redeem from market timers do not reflect current market prices of the foreign securities held by the fund.

* * * * *

37. Plaintiffs bring this complaint as a class action against Defendants Putnam International Equity Fund and Putnam Investment Management, LLC, and pursuant to § 5/2-801 et seq., of the Illinois Code of Civil Procedure individually and on behalf of a class of all persons in the United States who have held shares of Putnam International Equity Fund for more than fourteen days from the date of purchase to the date of sale (redemption) or exchange ("long term shareholders"). The class period commences five years prior to the filing of this complaint through the date of filing. Excluded from the class are Defendants, any parent, subsidiary, affiliate, or controlled person of Defendants, as well as the officers, directors, agents, servants or employees of Defendants, and the immediate family members of any such person. Also excluded is any judge who may preside over this case.

* * * * *

49. Defendants breached their duties of due care owed to Plaintiffs Steve and Beth Dudley and similarly situated

shareholders of the Putnam International Equity Fund by, inter alia:

a. failing to properly evaluate on a daily basis whether a significant event affecting the value of Putnam International Equity Fund's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

b. failing to implement Putnam International Equity Fund's portfolio valuation and share pricing policies and procedures; and

c. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Putnam International Equity Fund's shares at the expense of long term shareholders.

* * * * *

COUNT II

Plaintiffs, Steve and Beth Dudley, individually and on behalf of all others similarly situated, by and through their undersigned counsel, and for Count II of their Complaint against Defendants Putnam International Fund and Putnam Fund Manager, state as follows:

* * * * *

53. Defendants knew, or were negligent in not knowing, that the closing prices for the foreign securities held by the Putnam International Equity Fund and used by Defendants to calculate NAV for said Fund did not represent current market value because, inter alia, those prices did not reflect changes in the fund's securities which occurred after the exchange on which those foreign securities trade closed and before defendants calculated NAV and share price.

54. With utter indifference and conscious disregard for Plaintiffs Steve and Beth Dudley's investment and the investments of similarly situated fund shareholders, De-

fendants willfully and wantonly breached their duties to Plaintiffs Steve and Beth Dudley and similarly situated shareholders by, inter alia:

a. failing to know and implement applicable rules and regulations concerning the calculation of NAV;

b. failing to properly evaluate on a daily basis whether a significant event affecting the value of Putnam International Equity Fund's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share prices;

c. failing to implement Putnam International Equity Fund's portfolio valuation and share pricing policies and procedures; and

d. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Putnam International Equity Fund's shares at the expense of long term shareholders.

* * * * *

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 03-L-1550

GARY VOGELER, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

COLUMBIA ACORN TRUST AND
COLUMBIA WANGER ASSET MANAGEMENT, LP,
Defendants.

[Filed Nov. 13, 2003]

COMPLAINT

* * * * *

13. Studies of world financial markets have established associations between the value changes among various markets. There is a positive correlation between value movements in the United States market and value movements in foreign markets. If the United States market experiences an upward movement in values, it can be predicted that Asian markets will move upward once trading begins their next day. The same upward movement can be predicted for European markets once trading begins their next day. Similarly, if the United States market experiences a downward movement in values, it can be predicted that Asian and European markets will move downward once trading begins their next day. Because of these positive correlations, the closing prices of the foreign securities in the underlying portfolio may not reflect current market values at the time Defendants set their fund NAV. Appropriate adjustments need to be made to the closing

prices of the foreign securities in order to reflect current market values. Despite knowledge of the United States market result, continuous trading of the world equity indexes, ADRs, foreign currency futures markets, and the correlations between the value of the fund's securities and these benchmarks, Defendants do not make any value adjustment to the portfolio's foreign securities prior to calculating fund NAV and setting share price every business day.

* * * * *

28. A significant portion of the underlying foreign securities in the Defendants' fund portfolio are listed on foreign exchanges and trade during each market's respective session. The NAVs set by Defendants do not take into account on a daily basis any price relevant information that has become available in this two to fourteen and one/half hour interval, after the final prices for the underlying foreign securities have been posted but, prior to the setting of the NAVs. Price relevant information, such as the continuous trading of world equity market indexes, ADRs, and foreign currency futures impacts the valuation of these underlying foreign securities and is significant for valuation because the final market prices have become stale and do not reflect the current market value of the securities.

29. By failing to make daily adjustments based upon positive correlations between upward or downward movements in United States and foreign markets and by choosing to use stale prices in valuing their fund shares and setting their daily NAVs, Defendants have exposed long term shareholders to market timing traders who regularly purchase and redeem Defendants' fund shares as part of a profitable trading strategy. The market timing trading strategy stems from the ability of market timing traders to predict changes in the NAV. Market timing traders are able to predict changes in the NAV because of the positive correlations between value movements in United States markets and foreign markets. The stale price strategy of

market timers who trade Defendants' shares is to buy shares on days when the United States market moves up and to sell (redeem) shares when the United States market moves down. In order to derive maximum benefit from price relevant information developed subsequent to the now stale closing prices of the portfolio securities, market timers wait until the fund deadline for buying or selling (redeeming) shares in Defendants' funds on any particular business day. Because Defendants cannot buy or sell the foreign securities in the funds' underlying portfolio (due to the time difference between New York and the home markets of the foreign securities) at the time it sets the daily NAV that values the shares it issues and redeems, the shares that Defendants issue to and redeem from market timers do not reflect current market prices of the foreign securities held by the fund.

* * * * *

37. Plaintiff brings this complaint as a class action against Defendants Columbia Trust and Columbia Fund Manager, and pursuant to § 5/2-801 et seq., of the Illinois Code of Civil Procedure individually and on behalf of a class of all persons in the United States who have held shares of Columbia Acorn for more than fourteen days from the date of purchase to the date of sale (redemption) or exchange ("long term shareholders"). The class period commences five years prior to the fling of this complaint through the date of filing. Excluded from the class are Defendants, any parent, subsidiary, affiliate, or controlled person of Defendants, as well as the officers, directors, agents, servants or employees of Defendants, and the immediate family members of any such person. Also excluded is any judge who may preside over this case.

* * * * *

COUNT I

Plaintiff, Gary Vogeler, individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for Count I of his Complaint against Defen-

dants Columbia Trust and Columbia Fund Manager, states as follows:

* * * * *

49. Defendants breached their duties of due care owed to Plaintiff Gary Vogeler and similarly situated shareholders of the Columbia Acorn by, inter alia:

a. failing to properly evaluate on a daily basis whether a significant event affecting the value of Columbia Acorn's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share price;

b. failing to implement Columbia Acorn's portfolio valuation and share pricing policies and procedures; and

c. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Columbia Acorn's shares at the expense of long term shareholders.

* * * * *

COUNT II

Plaintiff Gary Vogeler, individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for Count II of his Complaint against Defendants Columbia Trust and Columbia Fund Manager, states as follows:

* * * * *

53. Defendants knew, or were negligent in not knowing, that the closing prices for the foreign securities held by the Columbia Acorn and used by Defendants to calculate NAV for said Fund did not represent current market value because, inter alia, those prices did not reflect changes in the fund's securities which occurred after the exchange on which those foreign securities trade closed

and before the daily calculation of the fund NAV and the setting of share price.

54. With utter indifference and conscious disregard for Plaintiff's investment and the investments of similarly situated fund shareholders, Defendants willfully and wantonly breached their duties to Plaintiff and similarly situated shareholders by, inter alia:

a. failing to know and implement applicable rules and regulations concerning the calculation of NAV;

b. failing to properly evaluate on a daily basis whether a significant event affecting the value of Columbia Acorn's portfolio of securities had occurred after the foreign trading markets for such securities had closed but before Defendants calculated NAV and share price;

c. failing to implement Columbia Acorn's portfolio valuation and share pricing policies and procedures; and

d. allowing portfolio valuation and share pricing policies and procedures which benefited market timing traders of Columbia Acorn's shares at the expense of long term shareholders.

* * * * *

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 03-L-2036

AVERY JACKSON, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

VAN KAMPEN SERIES FUND, INC. AND
VAN KAMPEN INVESTMENT ADVISORY CORP.,
Defendants.

[Filed Dec. 18, 2003]

COMPLAINT

* * * * *

13. Studies of world financial markets have established associations between the value changes among various markets. There is a positive correlation between value movements in the United States market and value movements in foreign markets. If the United States market experiences an upward movement in values, it can be predicted that Asian markets will move upward once trading begins their next day. The same upward movement can be predicted for European markets once trading begins their next day. Similarly, if the United States market experiences a downward movement in values, it can be predicted that Asian and European markets will move downward once trading begins their next day. Because of these positive correlations, the closing prices of the foreign securities in the underlying portfolio may not reflect current market values at the time Defendants set their fund NAV. Appropriate adjustments need to be made to the closing

prices of the foreign securities in order to reflect current market values. Despite knowledge of the United States market result, continuous trading of the world equity indexes, ADRs, foreign currency futures markets and the correlations between the value of the fund's securities and these benchmarks, Defendants do not make any value adjustment to the portfolio's foreign securities prior to calculating fund NAV and setting share price every business day.

* * * * *

28. A significant portion of the underlying foreign securities in the Defendants' fund portfolio are listed on foreign exchanges and trade during each market's respective session. The NAVs set by Defendants do not take into account on a daily basis any price relevant information that has become available in this two to fourteen and one/half hour interval, after the final prices for the underlying foreign securities have been posted but, prior to the setting of the NAVs. Price relevant information, such as the continuous trading of world equity market indexes, ADRs, and foreign currency futures impacts the valuation of these underlying foreign securities and is significant for valuation because the final market prices have become stale and do not reflect the current market value of the securities.

29. By failing to make daily adjustments based upon positive correlations between upward or downward movements in United States and foreign markets and by choosing to use stale prices in valuing their fund shares and setting their daily NAVs, Defendants have exposed long term shareholders to market timing traders who regularly purchase and redeem Defendants' shares as part of a profitable trading strategy. The market timing trading strategy stems from the ability of market timing traders to predict changes in the NAV. Market timing traders are able to predict changes in the NAV because of the positive correlations between value movements in United States markets and foreign markets. The stale price strategy of market

timers who trade Defendants' fund shares is to buy shares on days when the United States market moves up and to sell (redeem) shares when the United States market moves down. In order to derive maximum benefit from price relevant information developed subsequent to the now stale closing prices of the portfolio securities, market timers wait until the fund deadline for buying or selling (redeeming) shares in Defendants' funds on any particular business day. Because Defendants cannot buy or sell the foreign securities in the fund's underlying portfolio (due to the time difference between New York and the home markets of the foreign securities) at the time it sets the daily NAV that values the shares it issues and redeems, the shares that Defendants issue to and redeem from market timers do not reflect current market prices of the foreign securities held by the fund.

* * * * *

37. Plaintiff bring [*sic*] this complaint as a class action against Defendants Van Kampen Series Fund, Inc. and Van Kampen Investment Advisory Corp., and pursuant to § 5/2-801 et seq., of the Illinois Code of Civil Procedure individually and on behalf of a class of all persons in the United States who have held shares of Van Kampen International for more than fourteen days. The class period commences five years prior to the filing of this complaint through the date of filing. Excluded from the class are Defendants, any parent, subsidiary, affiliate, or controlled person of Defendants, as well as the officers, directors, agents, servants or employees of Defendants, and the immediate family members of any such person. Also excluded is any judge who may preside over this case.

* * * * *

Count I

Plaintiff, Avery Jackson, individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for Count I of his Complaint against

Defendants Van Kampen Funds and Van Kampen Advisor, states as follows:

* * * * *

49. Defendants breached their duties of due care owed to Plaintiff Avery Jackson and similarly situated shareholders of the Van Kampen International by, inter alia:

i. failing to properly evaluate on a daily basis price relevant information available after the close of the exchange on which Van Kampen International's portfolio of securities trade, but before the setting of the NAV, which was likely to change the value of the securities and the setting of their NAV;

ii. failing to properly adjust the value of Van Kampen International's portfolio securities and the setting of their NAV's when price relevant information available after the close of the exchange on which the portfolio's securities trade, but before the setting of the NAV, indicated a change in the value of the securities; and

iii. allowing portfolio valuation and share pricing policies and procedures which benefitted market timing traders of Van Kampen International's shares at the expense of long term shareholders.

* * * * *

Count II

Plaintiff, Avery Jackson, individually and on behalf of all others similarly situated, by and through his undersigned counsel, and for Count II of his Complaint against Defendants Van Kampen Funds and Van Kampen Advisor, states as follows.

* * * * *

52. Defendants knew, or were negligent in not knowing, that the closing prices for the foreign securities held by Van Kampen International and used by Defendants to calculate NAV for said Fund did not represent current

market value because, inter alia, those prices did not reflect changes in the fund's securities which occurred after the exchange on which those foreign securities trade closed and before defendants calculated NAV and share price.

53. With utter indifference or conscious disregard for Plaintiff Avery Jackson's investment and the investments of similarly situated fund shareholders, Defendants breached their duties to Plaintiff Avery Jackson and similarly situated shareholders by, inter alia:

i. failing to properly evaluate on a daily basis price relevant information available after the close of the exchange on which Van Kampen International's portfolio of securities trade, but before the setting of the NAV, which was likely to change the value of the securities and the setting of their NAV;

ii. failing to properly adjust the value of Van Kampen International's portfolio of securities and the setting of their NAV when price relevant information available after the close of the exchange on which the portfolio's securities trade, but before the setting of the NAV, indicated a change in the value of the securities;

iii. failing to implement Van Kampen International's portfolio valuation and share pricing policies and procedures; and

iv. allowing portfolio valuation and share pricing policies and procedures which benefitted market timing traders of Van Kampen International's shares at the expense of long term shareholders.

* * * * *

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 04-L-241

TERRY SPURGEON, AS CUSTODIAN FOR THE BENEFIT OF JAMES E. SPURGEON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

PACIFIC LIFE INSURANCE COMPANY,
Defendant.

[Filed Mar. 12, 2004]

COMPLAINT

Plaintiff Terry Spurgeon, as custodian for the benefit of James E. Spurgeon and on behalf of others similarly situated, states as follows for his Complaint against Pacific Life Insurance Company ("Pacific Life"):

THE PARTIES, JURISDICTION AND VENUE

1. Plaintiff Terry Spurgeon is a resident of Moro, Illinois, in Madison County.

2. At all times relevant to this Complaint, Plaintiff owned a Pacific Life Individual Flexible Premium Deferred Variable Annuity which he purchased for the benefit of his then-minor son, James E. Spurgeon pursuant to the Uniform Gifts to Minors Act.

3. Pacific Life is a California corporation with its principal place of business in Newport Beach, California.

4. Pacific Life is licensed to sell insurance products in Illinois, and at all times relevant to this Complaint, Pacific Life has promoted, marketed, and sold insurance and variable annuities to the investing public nationwide, including in Madison County, Illinois.

5. Pacific Life maintains investor relationships with clients in Madison County, Illinois, communicates regularly with them by mail and maintains an interactive website to communicate with clients, including clients in Madison County.

6. The transactions which are the subject of this Complaint occurred in part in Madison County, Illinois.

7. This Court therefore has jurisdiction over Pacific Life pursuant to 735 ILCS § 5/2-209, and venue is proper in this County pursuant to 735 ILCS § 5/2-101.

PACIFIC LIFE'S VARIABLE ANNUITY FUNDS

8. Issuers of variable annuities like Pacific Life have marketed the advantages of long-term investment through variable annuities (such as professional management, diversification, insurance protection and tax deferral) over direct investment in securities.

9. A Pacific Life annuity, such as the Pacific Life Individual Flexible Premium Deferred Variable Annuity, is a contract between an investor and Pacific Life, in which the investor agrees to make at least one minimum premium payment to Pacific Life in return for a series of annuity payments at a later date.

10. The Pacific Life annuities which are the subject of this Complaint are those which consist of a "separate account" which keeps investors' assets separate from Pacific Life's assets, and each annuity's separate account is further divided into multiple sub-accounts. Each sub-account corresponds to a single mutual fund, and Pacific Life invests the assets of each sub-account in that sub-account's corresponding mutual fund. These mutual funds are

maintained exclusively for variable annuity or variable life insurance products, although they often bear names very similar to those of retail mutual funds.

11. An investor may allocate his premium payment and accumulated proceeds in the variable annuity among one or more of the various sub-accounts.

12. Different Pacific Life annuities permit investment in some of the same sub-accounts, meaning that owners of different annuities may nevertheless be invested in the same sub-accounts.

13. When an investor allocates any portion of a premium payment or accumulated proceeds to a sub-account, Pacific Life credits that sub-account with sub-account "units."

14. Units in Pacific Life's sub-accounts can be traded, either by purchase or redemption, only once a day at 4:00 p.m. Eastern Time.

15. Sub-account units are sold at a price based upon the sub-account "unit value" (UV) plus applicable sales charges. Units of the sub-accounts may be redeemed at the UV less any redemption or surrender charges. The UV is the value of a single accumulation unit in a sub-account.

16. The number of accumulation units an investor receives is determined when he allocates some or all of a premium payment or accumulated proceeds to a sub-account. The number of units is determined by dividing the amount of the premium payment or accumulated proceeds allocated to the sub-account by the UV of one unit of that sub-account.

17. The initial UV of each sub-account was $10 on the trading day the sub-account began operations.

18. Pacific Life establishes a new daily UV for each sub-account once every trading day at the close of trading on the New York Stock Exchange at 4:00 p.m. Eastern Time.

19. Pacific Life establishes the daily UV for each sub-account by multiplying each sub-account's UV for the prior trading day by a "net investment factor."

20. The "net investment factor" equals the quotient obtained by dividing the per share value of the assets of that sub-account (A) as of the end of that valuation period by the net asset value per share of the corresponding mutual fund as of the end of the preceding valuation period (B), minus certain daily charges, fees and deductions (C) (*i.e.*, net investment factor = (A / B) - C). A valuation period is the period between a trading day and the immediately preceding trading day.

21. Because a sub-account's UV is based upon the per share value of the underlying mutual fund, the value of an investor's sub-account units is subject to change much the same way that the value of a mutual fund share changes each day. The value of an investor's sub-account units will fluctuate as the value of the corresponding mutual fund fluctuates.

22. The mutual funds in which Pacific Life invests sub-account assets are managed by fund managers with which Pacific Life contracts.

23. The fund managers handle the day-to-day tasks associated with managing an investment portfolio, such as investment management and valuation of the mutual fund's underlying portfolio of securities.

24. At the end of each trading day, the assets of the mutual fund are valuated, and a "net asset value" is established for the mutual fund. That net asset value is the same net asset value Pacific Life uses to establish the corresponding sub-account's daily UV.

PACIFIC LIFE'S SUB-ACCOUNTS' UNDERLYTNG PORTFOLIOS INCLUDE FOREIGN MUTUAL FUNDS

25. Some of the mutual funds in which the annuity sub-accounts are invested include in their portfolios securities which are traded in markets outside of the United States.

26. In valuing the assets of a mutual fund, the fund manager uses the last trade price in the home market of each of the securities in its portfolio. The home markets for such foreign securities include London, Paris, Frankfurt, Moscow, Singapore, Kuala Lumpur, Hong Kong, Taipei. Tokyo and Sydney. These markets are located in time zones that are five to fifteen hours ahead of Eastern Time.

27. Thus, a five to fifteen hour interval elapses between the close of the foreign securities markets and Pacific Life's calculation of its sub-account's UVs.

28. For example, the exchange located in Tokyo, Japan observes normal trading hours of 9:00 a.m. to 3:00 p.m. local time. Active trading of securities traded on this exchange ends, and closing prices for those securities are posted, at 3:00 p.m. local time (2:00 a.m. Eastern time). When the mutual fund calculates the value of its portfolio securities using closing prices from this exchange and Pacific Life sets its sub-account UV based upon those values, Pacific Life relies upon closing prices for securities traded on this exchange that have been static for 14 hours.

29. Studies of world financial markets have established associations between the value changes among various markets. There is a positive correlation between value movements in the U.S. markets and value movements in foreign markets. If the U.S. markets experience an upward movement in values, it can be predicted that Asian markets will move upward once trading begins the next day. The same upward movement can be predicted for European markets once trading begins the next day. Similarly, if the U.S. markets experience a downward move-

ment in values, it can be predicted that Asian and European markets will move downward once trading begins the next day.

30. Studies also demonstrate that the greater the percentage increase or decrease in the value of U.S. markets, the more likely foreign markets will post corresponding value movements on the subsequent trading day. The probability that the value movements of foreign markets will follow the previous day's value movements in U.S. markets is directly correlated to the degree or extent of the value movement of U.S. markets.

PACIFIC LIFE EXPOSES INVESTORS TO MARKET TIMING TRADING

31. A significant portion of the underlying securities in the mutual fund portfolios associated with the Pacific Life sub-accounts are listed on foreign exchanges and trade during each market's respective session. The share values set by these mutual funds and used by Pacific Life in setting its UV do not take into account on a daily basis any price relevant information (such as value movements in the U.S. markets, changes in world equity market indices, changes in the value of American Depository Receipts (ADRs), and fluctuations in foreign currency futures markets) that has become available in the interval between the close of the foreign markets and the calculation of the UV. Such price relevant information impacts the valuation of the underlying securities in the mutual funds in which sub-account proceeds are invested and the subsequent calculation of the sub-accounts' UVs. Such price relevant information is significant because the final market prices of the foreign securities often have become stale and no longer accurately reflect the true current market value of the securities.

32. By failing to make daily adjustments based upon the direction and degree of correlations between movements in U.S. and foreign markets, changes in world equity market indices, changes in the value of ADRs, and

fluctuations in foreign currency futures markets, and by calculating sub-account UVs based upon the corresponding mutual funds' net asset values which, in turn, are based upon the stale prices of foreign securities in the mutual funds' portfolios, Pacific Life has exposed long-term annuity owners to market timing traders who regularly purchase and redeem units of Pacific Life's sub-accounts as part of a profitable, stale-price trading strategy.

33. Market timing trading strategy is a short-term trading strategy which takes advantage of the stale pricing of the foreign securities upon which the sub-accounts' UVs are based, enabling such traders to predict changes in the UVs as a result of price relevant events that occur after the close of foreign securities markets and before Pacific Life calculates the sub-accounts' daily UVs. Market timing traders are able to predict changes in sub-account UVs because of the positive directional and degree of correlations between movements in U.S. and foreign markets, changes in world equity market indices, changes in the value of ADRs, and fluctuations in foreign currency futures markets.

34. The stale price strategy of market timers who trade in units of Pacific Life's sub-accounts is to buy units on days when the U.S. markets move up and to redeem units when the U.S. markets move down. In order to derive maximum benefit from price relevant information developed subsequent to the now stale closing prices of the portfolio securities, market timers wait until the variable annuity's deadline for buying or redeeming units in Pacific Life's sub-accounts on any particular business day. Because Pacific Life cannot make an investment in the underlying mutual fund and the mutual fund cannot buy or sell the foreign securities in its underlying portfolio (due to the time difference between New York and the home markets of the foreign securities) at the time Pacific Life sets the daily UV, the units that Pacific Life issues to and redeems from market timers do not reflect the actual value

of the foreign securities held in the portfolio of the corresponding mutual fund.

35. Due to Pacific Life's use of mutual fund net asset values which are based upon stale prices of foreign securities, market timers who buy Pacific Life's sub-account units on days when the U.S. markets move up are buying discounted units and thereby dilute the ownership interests of other sub-account holders because the sub-accounts' underlying foreign securities assets are undervalued as of the time of the unit purchase.

36. Due to Pacific Life's use of mutual fund net asset values which are based upon stale prices of foreign securities, market timers who redeem Pacific Life's units on days when the U.S. markets move down are redeeming units at a premium and thereby dilute the ownership interests of other sub-account holders because the underlying foreign securities assets are overvalued as of the time of the unit redemption.

37. The excess profits that market timing traders obtain take advantage of the stale pricing of Pacific Life's sub-accounts and dilute the ownership interests of other sub-account holders. When market timing traders buy units at stale, discounted prices, the ownership interests of other sub-account holders are diluted because the market timer has unfairly become, per unit, an equal sub-account owner with existing owners per unit. When market timing traders later redeem those units at a premium, the prior dilution of other sub-account holders' ownership interests is made permanent and, if the UV is then artificially inflated as a result of Pacific Life's UV calculation practices, may further dilute other sub-account holders' ownership interests. Long-term sub-account holders suffer a dilution in their ownership interests and the wealth represented by that diluted amount is transferred from them to market timing traders. Thus, the market timing trades capture an arbitrage profit that comes dollar-for-dollar out of the pockets of the investors.

CLASS ACTION ALLEGATIONS

38. Through his ownership of the Pacific Life Individual Flexible Premium Deferred Variable Annuity, Plaintiff at all times relevant to this Complaint held units in the Lazard International Value Fund sub-account for the purpose of long-term investment.

39. Plaintiff brings this class action on behalf of himself and on behalf of a class of all persons in the United States who, through their ownership of an Pacific Life annuity or insurance products, held units of any Pacific Life sub-account invested in mutual funds which included foreign securities in their portfolios and which experienced market timing trading activity. Excluded from the Class are Pacific Life and any of its parent, subsidiary or affiliated corporations, as well as any of their controlled persons, officers, directors, agents, servants or employees, and the immediate family members of any such person; any judge who may preside over this case; all persons who have claims in excess of $75,000; and any investor who engaged in market timing trading in the Pacific Life sub-accounts which are the subject of this Complaint.

40. Excluded from this Complaint are any claims based upon Pacific Life's conduct in connection with Plaintiff's or any class member's purchase or sale of any Pacific Life annuity product or units in any Pacific Life sub-account.

41. Plaintiff is a member of the Class and will fairly and adequately assert and protect the interests of the Class. Plaintiff's interests are coincident with, and not antagonistic to, those of other class members.

42. Plaintiff has retained attorneys who are experienced in class action litigation.

43. Members of the Class are so numerous and geographically dispersed that joinder of all members is impracticable. While Plaintiff cannot ascertain the exact number and identity of class members prior to discovery, on information and belief, there are thousands of class

members and their identity can be ascertained from Pacific Life's books and records.

44. There are questions of law or fact common to the Class.

45. Those common questions predominate over any questions affecting only individual members of the Class. Common questions include, but are not limited to, the following:

a. whether Pacific Life negligently failed to evaluate on a daily basis price relevant information available after the close of the exchanges in which the securities held by the mutual funds' portfolios trade, but before the setting of the daily UV, which was likely to change the value of the mutual fund securities and thus sub-account UVs;

b. whether Pacific Life negligently failed to implement valuation and pricing policies and procedures which account for price relevant events occurring after the close of the exchanges in which the securities held by the mutual funds' portfolios trade, but before the setting of the daily UV, when calculating the UV when closing prices of mutual fund portfolio securities did not reflect their true market values;

c. whether Pacific Life negligently failed to protect its sub-account holders from market timing trading;

d. whether Pacific Life breached its fiduciary obligations to Plaintiff and the Class by failing to evaluate on a daily basis price relevant information available after the close of the exchanges in which the securities held by the mutual funds' portfolios trade, but before the setting of the daily UV, which was likely to change the value of the mutual fund securities and thus sub-account UVs;

e. whether Pacific Life breached its fiduciary obligations to Plaintiff and the Class by failing to imple-

ment valuation and pricing policies and procedures which account for price relevant events occurring after the close of the exchanges in which the securities held by the mutual funds' portfolios trade, but before the setting of the daily UV, when calculating the UV whenever closing prices of mutual fund portfolio securities did not reflect their true market values;

f. whether Pacific Life breached its fiduciary obligations to Plaintiff and the Class by failing to implement valuation and pricing policies that use price relevant information to value mutual fund portfolio securities and sub-account UVs whenever closing prices of the securities held by the mutual funds' portfolios did not reflect their true market values;

g. whether Pacific Life breached its fiduciary obligations to Plaintiff and the Class by failing to protect Pacific Life sub-account holders from market timing trading;

h. whether Plaintiff and the Class have sustained damages as a result of Pacific Life's conduct; and/or

i. the proper measure of any such damages.

46. The prosecution of separate actions by individual members of the Class would create a risk of:

a. inconsistent or varying adjudications with respect to individual members of the Class; and/or

b. adjudication with the respect to individual members of the class, which would, as a practical matter, be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protest their interest.

47. The class action method is appropriate for the fair and efficient prosecution of this action.

48. Individual litigation of all claims, which might be brought by all class members, would produce a multiplicity

of cases so that the judicial system would be congested for years. Class treatment, by contrast, provides manageable judicial treatment calculated to bring a rapid conclusion to all litigation of all claims arising from the conduct of Pacific Life.

COUNT I

49. Plaintiff repeats and incorporates by reference paragraphs 1 through 48 as if fully set forth herein.

50. Pacific Life directly or impliedly held itself out as a skilled specialist in the field of investment management, possessing the specialized knowledge, skill and care ordinarily used by reasonably well-qualified members of the investment management profession.

51. It thereby became Pacific Life's duty to exercise that degree of knowledge, skill and care ordinarily used, or which should be used, by reasonably well-qualified members of the investment management profession, including but not limited to the duties:

a. to use mutual fund share values predicated upon accurate market values when valuing sub-accounts and setting their daily UV's; and/or

b. to prevent market timing trading in sub-accounts to prevent the dilution of the ownership interests of long-term investors.

52. Pacific Life knew or should have known that the closing prices for the foreign securities held in its sub-accounts' corresponding mutual funds' portfolios did not represent accurate market values of those foreign securities whenever price relevant events had occurred after the closing of foreign securities markets but before Pacific Life's calculation of daily UVs.

53. Pacific Life was negligent in one or more of the following ways:

a. failing to evaluate on a daily basis price relevant information available to Pacific Life after the close

of foreign securities markets in which the underlying mutual funds' portfolios of securities traded;

b. failing to adjust calculation of the daily UV to take into account any changes in value of the foreign securities held in the underlying mutual funds' portfolios whenever price relevant events occurred after the closing of the foreign securities markets but before Pacific Life's calculation of daily UVs;

c. failing to implement Pacific Life's valuation and unit pricing policies and procedures;

d. using valuation and unit pricing policies and procedures which benefited market timing traders of Pacific Life's sub-accounts at the expense of long-term sub-account holders; and/or

e. by favoring certain investors and permitting them to engage in market timing trading at the expense of other investors, namely Plaintiff and the Class.

54. As a direct and proximate result of Pacific Life's negligence, Plaintiff and the Class have suffered damages in the amount to be proven at trial, but less than $75,000 per Plaintiff or Class member, including all compensatory damages and costs.

WHEREFORE, Plaintiff and the Class pray that the Court enter judgment in their favor and against PACIFIC LIFE INSURANCE COMPANY; ordering that this action be maintained as a class action pursuant to 735 ILCS § 5/2-801 and certifying an appropriate class; and awarding Plaintiff and the Class compensatory damages, attorney's fees, prejudgment interest, and costs of suit in an amount not to exceed $75,000 per plaintiff or class member. Plaintiff demands a trial by jury on all issues so triable.

COUNT II

55. Plaintiff repeats and incorporates by reference paragraphs 1 through 48 and 50 through 51 as if fully set forth herein.

56. Pacific Life knew or was recklessly indifferent to the fact that the closing prices for the foreign securities held in its sub-accounts' corresponding mutual funds' portfolios did not represent accurate market values of those foreign securities whenever price relevant events had occurred after the closing of foreign securities markets and before Pacific Life's calculation of the daily UVs.

57. Pacific Life knowingly or with utter indifference to and conscious disregard for the rights of Plaintiff and the Class willfully and wantonly engaged in one or more of the following acts or omissions:

a. failing to evaluate on a daily basis price relevant information available to Pacific Life after the close of foreign securities markets in which the underlying mutual funds' portfolios of securities traded;

b. failing to adjust calculation of the daily UV to take into account any changes in value of the foreign securities held in the underlying mutual funds' portfolios whenever price relevant events occurred after the closing of the foreign securities markets but before Pacific Life's calculation of daily UVs;

c. failing to implement Pacific Life's valuation and unit pricing policies and procedures;

d. using valuation and unit pricing policies and procedures which benefited market timing traders of Pacific Life's sub-accounts at the expense of long-term sub-account holders; and/or

e. by favoring certain investors and permitting them to engage in market timing trading at the expense of other investors, namely Plaintiff and the Class.

58. As a direct and proximate result of Pacific Life's foregoing conduct, Plaintiff and the Class have suffered damages in the amount to be proven at trial, but less than $75,000 per Plaintiff or Class member, including all compensatory damages and costs.

WHEREFORE, Plaintiff and the Class pray that the Court enter judgment in their favor and against PACIFIC LIFE INSURANCE COMPANY; ordering that this action be maintained as a class action pursuant to 735 ILCS § 5/2-801 and certifying an appropriate class; and awarding Plaintiff and the Class compensatory and punitive damages, attorney's fees, prejudgment interest, and costs of suit in an amount not to exceed $75,000 per plaintiff or class member. Plaintiff demands a trial by jury on all triable issues.

COUNT III

59. Plaintiff repeats and incorporates by reference paragraphs 1 through 48 and 50 through 51 as if fully set forth herein.

60. A special relationship existed between Pacific Life and Plaintiff and the Class as a result of the following:

a. Pacific Life is a stock corporation. The shareholders select the board of directors who will manage Pacific Life's assets, and the directors act as fiduciaries in managing Plaintiff's and Class' funds;

b. Pacific Life assumed a position of trust and confidence by servicing and managing Plaintiff's and class members' investments in Pacific Life annuities;

c. The calculation of the UV was within the exclusive control of Pacific Life;

d. Whether market timing was allowed to occur in the sub-accounts was within the exclusive control of Pacific Life;

e. Because Pacific Life's variable annuities were contracts of adhesion prepared by Pacific Life and not subject to negotiation, unequal bargaining power existed between Plaintiff and class members and Pacific Life;

f. Pacific Life and its agents held themselves out as highly-skilled insurance and financial experts, possessing the special knowledge and expertise needed to interpret and understand the complex and sophisticated daily management of annuity investments; and/or

g. Pacific Life is an insurer characterized by elements of public interest which subject it to more stringent standards of conduct than those normally arising out of contract.

61. As a result of the foregoing, Pacific Life was a fiduciary to Plaintiff and Class members, and Pacific Life owed Plaintiff and the Class certain fiduciary duties.

62. Pacific Life breached its fiduciary duties to Plaintiff and the Class in one or more of the following ways:

a. exposing Plaintiff's and the Class' ownership interests in the sub-accounts to dilution through market timing trading by failing to evaluate on a daily basis price relevant information available to Pacific Life after the close of foreign securities markets in which the underlying mutual funds' portfolios of securities traded;

b. exposing Plaintiff's and the Class' ownership interests in the sub-accounts to dilution through market timing trading by failing to adjust calculation of the daily UV to take into account any changes in value of the foreign securities held in the underlying mutual funds' portfolios whenever price relevant events occurred after the closing of the foreign securities markets but before Pacific Life's calculation of daily UVs;

c. exposing Plaintiff's and the Class' ownership interests in the sub-accounts to dilution through market timing trading by failing to implement Pacific Life's valuation and unit pricing policies and procedures;

d. exposing Plaintiff's and the Class' ownership interests in the sub-accounts to dilution through market timing trading by using valuation and unit pricing policies and procedures which benefited market timing traders of Pacific Life's sub-accounts at the expense of long-term sub-account holders;

e. by failing to provide complete and truthful information to Plaintiff and the Class regarding Pacific Life's allowance of market timing activities in Pacific Life sub-accounts;

f. by failing to provide complete and truthful information to Plaintiff and the Class regarding the dilution of their holdings due to Pacific Life's failure to use accurate market values of foreign securities held in the underlying mutual funds' portfolios when setting daily UV's; and/or

g. by favoring certain investors and permitting them to engage in market timing trading at the expense of other investors, namely Plaintiff and the Class.

63. As a direct and proximate result of Pacific Life's breaches of fiduciary duties, Plaintiff and the Class have suffered damages in the amount to be proven at trial, but less than $75,000 per plaintiff or class member, including all compensatory damages and costs.

WHEREFORE, Plaintiff and the Class pray that the Court enter judgment in their favor and against PACIFIC LIFE INSURANCE COMPANY; ordering that this action be maintained as a class action pursuant to 735 ILCS § 5/2-801 and certifying an appropriate class; and awarding Plaintiff and the Class compensatory and punitive damages, attorney's fees, prejudgment interest, and costs of suit in an amount not to exceed $75,000 per plaintiff or class member. Plaintiff demands a trial by jury on all issues so triable.

COUNT IV

64. Plaintiff repeats and incorporates by reference paragraphs 1 through 63 as if fully set forth herein.

65. Pacific Life's valuation and unit pricing policies and practices which are the subject of this Complaint were conceived and emanated from California.

66. Because Pacific Life is a California corporation with its principal place of business in California and because Pacific Life's valuation and unit pricing policies and practices which are the subject of this Complaint were conceived in and emanated from California, Pacific Life is subject to the provisions of Cal. Bus. & Prof. Code § 17200 *et seq.*

67. California Bus. & Prof. Code § 17200 prohibits any "unlawful . . . business act or practice." Pacific Life has violated Cal. Bus. & Prof. Code § 17200's prohibition against engaging in an unlawful act or practice by violating the common law as alleged in Counts I through III of this Complaint.

68. Plaintiff reserves the right to allege other violations of law, which constitute other unlawful business acts or practices. Such conduct is ongoing and continues to this date.

69. California Bus. & Prof. Code § 17200 also prohibits any "unfair . . . business act or practice." As detailed in the preceding paragraphs, Pacific Life engaged in conduct that is unfair within the meaning of Cal. Bus. & Prof. Code § 17200 *et seq.* Pacific Life's practices offend public policy and are unethical, oppressive, unscrupulous and violate the laws identified herein and the policies supporting those laws.

70. Pacific Life's conduct caused and continues to cause substantial injury to Plaintiff and Class members.

71. The justifications, if any, for Pacific Life's wrongful conduct were and are vastly outweighed by the adverse effects of such conduct.

72. Finally, there were reasonably available alternatives to Pacific Life to further its business interests, other than the acts and omissions described in this Complaint. As a result, Pacific Life engaged in unfair business practices prohibited by Cal. Bus. & Prof. Code § 17200 *et seq.*

73. California Bus. & Prof. Code § 17200 also prohibits any "fraudulent business act or practice." Pacific Life's acts and omissions, as more fully set forth elsewhere in this Complaint, were fraudulent within the meaning of Cal. Bus. & Prof. Code § 17200, and were likely to deceive the public, Plaintiff and Class members. Pacific Life's fraudulent conduct constitutes a fraudulent business act or practice within the meaning of Cal. Bus. & Prof. Code § 17200 *et seq.*

74. Pacific Life engaged in these unlawful, unfair and fraudulent business acts and practices with others who participated, in whole and in part, in the conduct alleged.

75. As a result of the foregoing conduct, Pacific Life and any co-participants have been unjustly enriched at the expense of plaintiff and Class members.

76. As a co-participant in the violation of Cal. Bus. & Prof. Code § 17200 *et seq.*, Pacific Life is jointly and severally liable for the restoration to any person of any and all money that has been acquired by means of the alleged violations of Cal. Bus. & Prof. Code § 17200 *et seq.*

77. The unlawful, unfair, and fraudulent business practices of Defendant described above present a continuing threat to members of the public in that Defendant continues to engage in the conduct described herein.

WHEREFORE, Plaintiff and the Class pray that the Court order that this action be maintained as a class action pursuant to 735 ILCS § 5/2-801 and certify an appro-

priate class; grant restitution to Plaintiff and the Class by ordering Defendant PACIFIC LIFE INSURANCE COMPANY to return to Plaintiff and the Class all sums unlawfully and unfairly obtained from them as the result of Pacific Life's unfair and unlawful business practices in an amount not to exceed $75,000 per plaintiff or class member; and order Defendant PACIFIC LIFE INSURANCE COMPANY to pay to Plaintiffs and the Class all costs of suit, attorneys' fees, prejudgment interest and any other relief the Court deems appropriate under the circumstances in accordance with section 17200 of the California Business and Professions Code.

[attorney name and address blocks omitted]

STATUTORY AND REGULATORY PROVISIONS INVOLVED

15 U.S.C. § 77p provides:

§ 77p. Additional remedies; limitation on remedies

(a) Remedies additional

Except as provided in subsection (b) of this section, the rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity.

(b) Class action limitations

No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –

(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or

(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

(c) Removal of covered class actions

Any covered class action brought in any State court involving a covered security, as set forth in subsection (b) of this section, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b) of this section.

(d) Preservation of certain actions

(1) Actions under State law of State of incorporation

(A) Actions preserved

Notwithstanding subsection (b) or (c) of this section, a covered class action described in subparagraph (B) of this paragraph that is based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

(B) Permissible actions

A covered class action is described in this subparagraph if it involves –

(i) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

(ii) any recommendation, position, or other communication with respect to the sale of securities of the issuer that –

(I) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

(II) concerns decisions of those equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

(2) State actions

(A) In general

Notwithstanding any other provision of this section, nothing in this section may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving

a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.

(B) "State pension plan" defined

For purposes of this paragraph, the term "State pension plan" means a pension plan established and maintained for its employees by the government of the State or political subdivision thereof, or by any agency or instrumentality thereof.

(3) Actions under contractual agreements between issuers and indenture trustees

Notwithstanding subsection (b) or (c) of this section, a covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee may be maintained in a State or Federal court by a party to the agreement or a successor to such party.

(4) Remand of removed actions

In an action that has been removed from a State court pursuant to subsection (c) of this section, if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.

(e) Preservation of State jurisdiction

The securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions.

(f) Definitions

For purposes of this section, the following definitions shall apply:

(1) Affiliate of the issuer

The term "affiliate of the issuer" means a person that directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with, the issuer.

(2) Covered class action

(A) In general

The term "covered class action" means –

(i) any single lawsuit in which –

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which –

(I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

(B) Exception for derivative actions

Notwithstanding subparagraph (A), the term "covered class action" does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

(C) Counting of certain class members

For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

(D) Rule of construction

Nothing in this paragraph shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action.

(3) Covered security

The term "covered security" means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 77r(b) of this title at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred, except that such term shall not include any debt security that is exempt from registration under this subchapter pursuant to rules issued by the Commission under section 77d(2) of this title.

15 U.S.C. § 78j provides:

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange –

(a)(1) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Paragraph (1) of this subsection shall not apply to security futures products.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rules promulgated under subsection (b) of this section that prohibit fraud, manipulation, or insider trading (but not rules imposing or specifying reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading), and judicial precedents decided under subsection (b) of this section and rules promulgated thereunder that prohibit fraud, manipulation, or insider trading, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act) to the same extent as they apply to securities. Judicial precedents decided under section 77q(a) of this title and sections 78i,

78o, 78p, 78t, and 78u-1 of this title, and judicial precedents decided under applicable rules promulgated under such sections, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act) to the same extent as they apply to securities.

15 U.S.C. § 78bb provides:

§ 78bb. Effect on existing law

(a) Addition of rights and remedies; recovery of actual damages; State securities commissions

Except as provided in subsection (f) of this section, the rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. Except as otherwise specifically provided in this chapter, nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder. No State law which prohibits or regulates the making or promoting of wagering or gaming contracts, or the operation of "bucket shops" or other similar or related activities, shall invalidate any put, call, straddle, option, privilege, or other security subject to this chapter, or apply to any activity which is incidental or related to the offer, purchase, sale, exercise, settlement, or closeout of any such security. No provision of State law regarding the offer, sale, or distribution of securities shall apply to any transaction in a security futures product, except that this sentence shall not be construed as limiting any State antifraud law of general applicability.

(b) Modification of disciplinary procedures

Nothing in this chapter shall be construed to modify existing law with regard to the binding effect (1) on any member of or participant in any self-regulatory organization of any action taken by the authorities of such organization to settle disputes between its members or partici-

pants, (2) on any municipal securities dealer or municipal securities broker of any action taken pursuant to a procedure established by the Municipal Securities Rulemaking Board to settle disputes between municipal securities dealers and municipal securities brokers, or (3) of any action described in paragraph (1) or (2) on any person who has agreed to be bound thereby.

(c) Continuing validity of disciplinary sanctions

The stay, setting aside, or modification pursuant to section 78s(e) of this title of any disciplinary sanction imposed by a self-regulatory organization on a member thereof, person associated with a member, or participant therein, shall not affect the validity or force of any action taken as a result of such sanction by the self-regulatory organization prior to such stay, setting aside, or modification: *Provided*, That such action is not inconsistent with the provisions of this chapter or the rules or regulations thereunder. The rights of any person acting in good faith which arise out of any such action shall not be affected in any way by such stay, setting aside, or modification.

(d) Physical location of facilities of registered clearing agencies or registered transfer agents not to subject changes in beneficial or record ownership of securities to State or local taxes

No State or political subdivision thereof shall impose any tax on any change in beneficial or record ownership of securities effected through the facilities of a registered clearing agency or registered transfer agent or any nominee thereof or custodian therefor or upon the delivery or transfer of securities to or through or receipt from such agency or agent or any nominee thereof or custodian therefor, unless such change in beneficial or record ownership or such transfer or delivery or receipt would otherwise be taxable by such State or political subdivision if the facilities of such registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor were not physically located in the taxing State or

political subdivision. No State or political subdivision thereof shall impose any tax on securities which are deposited in or retained by a registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor, unless such securities would otherwise be taxable by such State or political subdivision if the facilities of such registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor were not physically located in the taxing State or political subdivision.

(e) Exchange, broker, and dealer commissions; brokerage and research services

(1) No person using the mails, or any means or instrumentality of interstate commerce, in the exercise of investment discretion with respect to an account shall be deemed to have acted unlawfully or to have breached a fiduciary duty under State or Federal law unless expressly provided to the contrary by a law enacted by the Congress or any State subsequent to June 4, 1975, solely by reason of his having caused the account to pay a member of an exchange, broker, or dealer an amount of commission for effecting a securities transaction in excess of the amount of commission another member of an exchange, broker, or dealer would have charged for effecting that transaction, if such person determined in good faith that such amount of commission was reasonable in relation to the value of the brokerage and research services provided by such member, broker, or dealer, viewed in terms of either that particular transaction or his overall responsibilities with respect to the accounts as to which he exercises investment discretion. This subsection is exclusive and plenary insofar as conduct is covered by the foregoing, unless otherwise expressly provided by contract: *Provided*, however, That nothing in this subsection shall be construed to impair or limit the power of the Commission under any other provision of this chapter or otherwise.

(2) A person exercising investment discretion with respect to an account shall make such disclosure of his policies and practices with respect to commissions that will be paid for effecting securities transactions, at such times and in such manner, as the appropriate regulatory agency, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(3) For purposes of this subsection a person provides brokerage and research services insofar as he –

(A) furnishes advice, either directly or through publications or writings, as to the value of securities, the advisability of investing in, purchasing, or selling securities, and the availability of securities or purchasers or sellers of securities;

(B) furnishes analyses and reports concerning issuers, industries, securities, economic factors and trends, portfolio strategy, and the performance of accounts; or

(C) effects securities transactions and performs functions incidental thereto (such as clearance, settlement, and custody) or required in connection therewith by rules of the Commission or a self-regulatory organization of which such person is a member or person associated with a member or in which such person is a participant.

(4) The provisions of this subsection shall not apply with regard to securities that are security futures products.

(f) Limitations on remedies

(1) Class action limitations

No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –

(A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or

(B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

(2) Removal of covered class actions

Any covered class action brought in any State court involving a covered security, as set forth in paragraph (1), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to paragraph (1).

(3) Preservation of certain actions

(A) Actions under State law of State of incorporation

(i) Actions preserved

Notwithstanding paragraph (1) or (2), a covered class action described in clause (ii) of this subparagraph that is based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

(ii) Permissible actions

A covered class action is described in this clause if it involves –

(I) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

(II) any recommendation, position, or other communication with respect to the sale of securities of an issuer that –

(aa) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

(bb) concerns decisions of such equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

(B) State actions

(i) In general

Notwithstanding any other provision of this subsection, nothing in this subsection may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.

(ii) State pension plan defined

For purposes of this subparagraph, the term "State pension plan" means a pension plan established and maintained for its employees by the government of a State or political subdivision thereof, or by any agency or instrumentality thereof.

(C) Actions under contractual agreements between issuers and indenture trustees

Notwithstanding paragraph (1) or (2), a covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee may be maintained in a State or Federal court by a party to the agreement or a successor to such party.

(D) Remand of removed actions

In an action that has been removed from a State court pursuant to paragraph (2), if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.

(4) Preservation of State jurisdiction

The securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions.

(5) Definitions

For purposes of this subsection, the following definitions shall apply:

(A) Affiliate of the issuer

The term "affiliate of the issuer" means a person that directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with, the issuer.

(B) Covered class action

The term "covered class action" means –

(i) any single lawsuit in which –

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties

similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which –

(I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

(C) Exception for derivative actions

Notwithstanding subparagraph (B), the term "covered class action" does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

(D) Counting of certain class members

For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

(E) Covered security

The term "covered security" means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 18(b) of the Securities Act of 1933 [15 U.S.C. 77r(b)], at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred, except that such term shall not include any debt security that is exempt from registration under the Securities Act of 1933 [15 U.S.C. 77a et seq.] pursuant to

rules issued by the Commission under section 4(2) of that Act [15 U.S.C. 77d(2)].

(F) Rule of construction

Nothing in this paragraph shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action.

28 U.S.C. § 1291 provides:

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1331 provides:

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1332 provides:

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title –

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or

contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C. § 1441 provides:

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e)(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if –

(A) the action could have been brought in a United States district court under section 1369 of this title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determi-

nation of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

28 U.S.C. § 1447 provides:

§ 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

17 C.F.R. § 240.10b-5 provides:

§ 240.10b-5. Employment of manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

Supreme Court of the United States

Office of the Clerk
Washington, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

July 22, 2005

Mr. David C. Frederick
Kellogg Huber Hansen
Todd, Evans & Figel, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, DC 20036

Re: Carl Kircher, et al.
v. Putnam Funds Trust, et al.
Application No. 05A73

Dear Mr. Frederick:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on July 22, 2005 extended the time to and including August 30, 2005.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by
/s/ GAIL JOHNSON
Gail Johnson
Case Analyst

[attached notification list omitted]

Supreme Court of the United States

Office of the Clerk
Washington, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

August 26, 2005

Mr. David C. Frederick
Kellogg Huber Hansen
Todd, Evans & Figel, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, DC 20036

Re: Carl Kircher, et al.
v. Putnam Funds Trust, et al.
Application No. 05A73

Dear Mr. Frederick:

The application for a further extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on August 26, 2005 extended the time to and including September 29, 2005.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by
/s/ GAIL JOHNSON
Gail Johnson
Case Analyst

[attached notification list omitted]